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IN THE
Supreme Court of the United States

LILIAN S. ILETO,

Petitioner,

v.

GLOCK, INC., RSR MANAGEMENT CORP., RSR GROUP NEVADA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Protection of Lawful Commerce in Arms Act ("PLCAA" or "Act"), 15 U.S.C. §§7901-7903, provides that certain actions against federally licensed manufacturers, sellers, and importers of firearms "may not be brought in any Federal or State court," 15 U.S.C. §7902(a), and applies that prohibition retroactively, requiring that any such action that is pending on October 26, 2005, "shall be immediately dismissed by the court in which the action was brought or is currently pending," 15 U.S.C. §7902(b). The PLCAA, however, excludes from its scope any action in which (1) a manufacturer or seller of a firearm "knowingly" violated a state or federal statute "applicable to the sale or marketing" of firearms, and (2) the violation was the proximate cause of the harm for which relief is sought. 15 U.S.C. §7903(5)(A)(iii). That exception is often called the "predicate exception," because it exempts suits where there has been a "predicate" violation of an applicable state or federal statute.

The questions presented are:

1. Whether the PLCAA's "predicate exception" for conduct that violates state statutes "applicable to" the marketing or sales of firearms encompasses the violation of state statutes that apply to firearms sales and marketing practices, or instead is limited to the violation of statutes expressly and exclusively regulating firearms sales and marketing?

2. Whether Congress may, consistent with the Due Process and Takings Clauses, abrogate an accrued and pending right of action recognized to be "property" under state law, without providing any alternative remedy, compensation, or means of recovering from the wrongdoer?

3. Whether a statute like the PLCAA that retroactively removes all legal means of redress for an accrued and cognizable state-law tort claim, without providing an alternative remedial scheme, is subject to mere rational basis review or instead is subject to more searching scrutiny?

4. Whether Congress violated separation-of-powers or federalism principles in enacting the PLCAA, purportedly under its Commerce Power, by which it strips state and federal courts of jurisdiction over a plaintiff's accrued and pending state-law tort claims, while providing no alternative remedial scheme, having found that such claims are "based on theories without foundation in hundreds of years of the common law"?

PARTIES AND PARTIES TO THE PROCEEDINGS BELOW

Petitioner Lilian Ileto was a plaintiff-appellant-appellee and petitioner in the court of appeals. Respondents Glock, Inc., RSR Management Corporation, and RSR Group Nevada, formerly doing business as RSR Wholesale Guns Seattle, Inc., were defendants-appellees in the court of appeals. Respondent United States of America was defendant-intervenor-appellee in the court of appeals. Joshua Stepakoff, a minor, by his parents Loren Lieb and Alan Stepakoff; Mindy Gale Finkelstein, a minor, by her parents David and Donna Finkelstein; Benjamin Kadish, a minor by his parents Eleanor and Charles Kadish; and Nathan Lawrence Powers, a minor, by his parents Gail and John Michael Powers, were plaintiffs-appellants-appellees in the court of appeals. China North Industries Corp., aka Norinco, was defendant-appellant-appellee in the court of appeals. Quality Parts Co., formerly doing business as Bushmaster Firearms, a Maine Corporation, was a defendant in the district court and an appellant in an earlier appeal in this lawsuit. Maadi, an Egyptian business entity; Imbel, a Brazilian business entity; The Loaner Pawnshop Too, a Washington corporation; David McGee, an individual; Intrac Arms International, Inc., a Tennessee Corporation, formerly doing business as Intrac Corporation and also known as Doe 1, were defendants in the district court.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	iii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	2
Reasons For Granting The Petition	13
I. The Courts Are Divided On The Scope Of The PLCAA	14
A. The Courts Are Divided On The Meaning Of The PLCAA's Predicate Exception	14
B. The Issue Is Important And Recurring	21
II. The Constitutional Issues Raised By The Ninth Circuit's Decision Likewise Warrant Review	24
A. The Ninth Circuit's Ruling That Causes Of Action Are Not Property Warrants Review	24
B. The Ninth Circuit's Decision Raises Significant Separation-Of-Powers, Federalism and Commerce Clause Issues	29
Conclusion	32
Appendix A – Court of Appeals Opinion (May 11, 2009)	1a
Appendix B – District Court Judgment (March 14, 2006)	73a

TABLE OF CONTENTS—Continued

Page

Appendix C – Court of Appeals Opinion (November 20, 2003) 128a

Appendix D – Court of Appeals Order Denying Petition for Rehearing and Rehearing En Banc (May 28, 2004) 192a

Appendix E – Court of Appeals Order Denying Petition for Rehearing and Rehearing En Banc (May 11, 2009) 209a

Appendix F – Relevant Statutory Provisions 213a

TABLE OF AUTHORITIES

Page

CASES

Board of Regents of State Colleges v. *Roth*, 408 U.S. 564 (1972) 25

Callet v. *Alioto*, 210 Cal. 65, 290 P. 438 (1930) 24

City of Gary ex rel. King, 801 N.E.2d 1222 (Ind. 2003) 15, 19, 20

City of New York v. *Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005) 16, 17, 18

City of New York v. *Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), cert. denied 129 S. Ct. 1579 (2009) ..... *passim*

Ducharme v. *Merrill-National Laboratories*, 574 F.2d 1307 (5th cir. 1978) 26

Duke Power Co. v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978) 11, 28

Fein v. *Permanente Med. Group*, 474 U.S. 892, 894-95 (1985) (White, J., dissenting from the denial of certiorari) 12, 28

Garcia v. *Wyeth-Ayerst Laboratories*, 385 F.3d 961 (6th Cir. 2004) 26

Greyhound Food Mngmt, Inc. v. *City of Dayton*, 653 F. Supp. 1207, 1213 – 21 (1986) 29

Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) 30

In re Arnold, 252 B.R. 778 (9th Cir. BAP 2000) 26

TABLE OF AUTHORITIES—Continued

Page

Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) ..... *passim*

Lyon v. *Augusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001) 9, 10

Mathis v. *Eli Lilly and Co.*, 719 F. 2d 134 (6th Cir. 1983) 26

Morris v. *Savoy*, 576 N.E.2d 765 (Ohio 1991) 28

Munn v. *Illinois*, 94 U.S. 113 (1876) 25, 27

New York Central R.R. Co. v. *White*, 243 U.S. 188 (1917) 11, 12, 27

PruneYard Shopping Ctr. v. *Robins*, 447 U.S. 74 (1980) 11, 27

Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) 31, 32

Scholz v. *Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) 29

Smith & Wesson Corp. v. *City of Gary*, 875 N.E.2d 422 (Ind. App. 2007) (transfer denied Jan. 12, 2009) ..... *passim*

U.S. v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 30, 31

CONSTITUTION AND STATUTES

U.S. CONST. art. 1 30

U.S. CONST. art. 3 2

U.S. CONST. amend. V 2, 24, 27

11 U.S.C. §541 (a)(1) 26

Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7901 *et seq.* 2

15 U.S.C. §7901 ..... 5, 6, 10, 13, 30

TABLE OF AUTHORITIES—Continued

Page

15 U.S.C. §7901(a) 5, 13, 36
15 U.S.C. §7901(a)(7) and (8) 15
15 U.S.C. §7901(b) 5, 14
15 U.S.C. §7901(b)(1) 13, 22
15 U.S.C. §7902(a) 5
15 U.S.C. §7902(b) 5
15 U.S.C. §7903 ..... 5, 13
15 U.S.C. §7903(5)(A) 6, 14
15 U.S.C. §7903(5)(A)(i)-(vi) 5
15 U.S.C. §7903(5)(A)(iii) 6, 7, 14
Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1603 4
28 U.S.C. §1254(1) 2
Fed. R. Civ. P. 12(b)(6) 4, 5
Cal. Civ. Code §1714(a) 2, 7, 21, 23
Cal. Civ. Code §3479 ..... 2, 7, 9, 19
Cal. Civ. Code §3480 ..... *passim*

MISCELLANEOUS

Black's Law Dictionary 98 (6th ed. 1990) 8
Carol A. Crocco, *Validity, Construction and Application of State Statutory Provisions Limiting Amount of Recovery in Malpractice Claims*, 26 A.L.R. 5th 245 §27 (1994 & Supp. 2009) 29
Harold R. Weinberg, *Tort Claims as Collateral: Impact on Consumer Finance*, 49 Consumer Fin. L.Q. Rep. 155, 162 n. 35 (1995) 26

TABLE OF AUTHORITIES—Continued

Page

Nowak and Rotunda, Constitutional Law 38 (6th ed.) 30

The Federalist No. 78 (Alexander Hamilton) 32

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lilian Ileto respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-72a) is reported at 565 F.3d 1126 (9th Cir. 2009). The order and opinion of the district court (App., *infra*, 73a-127a) is reported at 421 F. Supp. 2d 1274 (C.D. Cal. 2006). The earlier opinion of the court of appeals (App., *infra*, 128a–191a) is reported at 349 F.3d 1191 (9th Cir. 2003), cert. denied, 543 U.S. 1050 (2005).

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2009. The court of appeals denied a petition for rehearing and rehearing en banc on July 27, 2009 (App., *infra* 209a-212a). On October 14, 2009, Justice Kennedy extended the time during which to file a petition for writ of certiorari to and including December 16, 2009; on December 7, 2009, Justice Kennedy granted a further extension of time to and including December 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Due Process and Takings Clauses and Article III of the Constitution of the United States are set out in the Appendix at App., *infra*, 213a-214a. Relevant provisions of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7901 *et seq.*, are set forth in the Appendix at App., *infra*, 215a-233a. Relevant provisions of the California Civil Code §§1714(a), 3479, and 3480 are set forth in the Appendix at App., *infra*, 224a-225a.

STATEMENT

This case concerns whether Congress can, consistent with the Takings and Due Process Clauses of the United States Constitution as well as separation-of-powers principles, retroactively eliminate an accrued state-law cause of action for compensation—a cause of action recognized as property under state law—without providing any compensation or alternative remedy.

1. U.S. postal worker Joseph Ileto was killed on August 10, 1999, while delivering the mail. A neo-Nazi sympathizer named Buford Furrow—armed with a com-

pact, concealed 9 mm Glock 26 handgun—walked up to Ileto and shot him multiple times. App., *infra*, 129a, 134a-135a. Just hours earlier, Furrow had entered the North Valley Jewish Community Center summer camp in Granada Hills, California, and shot five others, including three small children. *Id.* at 129a. At the time of the shootings, Furrow was prohibited from possessing and purchasing firearms, having been previously convicted of a felony and involuntarily committed to a mental institution. *Id.* at 130a-131a. Furrow, however, had a total of seven firearms in his possession at the time of the shootings. *Id.* at 131a. Only 9 mm ammunition was recovered at both shooting scenes, and the only two firearms in Furrow's possession chambered for 9 mm ammunition were a Glock 26 and a China North "Norinco" model 320 assault-style rifle. *Id.* at 132a n.5.

In August of 2000, several victims of the shootings filed suit against (among others) Glock, Inc., RSR Management Corp., RSR Group Nevada (formerly RSR Wholesale Guns Seattle, Inc.) (collectively "RSR") and China North Industries Corp. ("China North") in Los Angeles County Superior Court. App., *infra*, 74a. Petitioner Lilian Ileto filed as Joseph Ileto's successor in interest and sole heir by intestacy, bringing wrongful death and survivor claims, based on negligence and public nuisance claims. *Ibid.* According to the complaint, defendants intentionally engaged in firearms sales and marketing practices that place firearms in the hands of criminals and those who were prohibited from possessing them. *Id.* at 133-137a, 140a, 150a-152a, 170a-171a, 185a. The complaint alleges that defendants, among other things, knowingly facilitate secondary markets where illegal purchasers acquire firearms, selecting and developing distribution channels known to regularly

provide guns to criminals and other prohibited persons. *Id.* at 149a. The complaint alleges that defendants design, produce, and advertise to target those secondary markets. The complaint further alleges that defendants, and other dealers to whom they distribute firearms, sell large volumes of unsuitable weapons to legitimate buyers, knowing that many will be resold in secondary markets or returned so the returned weapons can in turn be resold in secondary markets that lack the oversight necessary to prevent criminals from acquiring guns. The complaint also alleges that defendants deliberately choose not to provide dealers with training or instruction that would help avoid illegal trafficking in firearms. Those actions, the complaint alleges, were a substantial factor in the death of Joseph Ileto. *Id.* at 133a-138a, 150a-152a, 163a, 171a. (California uses a "substantial factor" proximate cause standard. *Id.* at 154a.)

On November 14, 2001, China North removed the lawsuit to federal court under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1603. App., *infra*, 74a. The district court then granted motions to dismiss under Fed. R. Civ. P. 12(b)(6), holding that the complaint failed to state a claim for negligence or nuisance. App., *infra*, 74a.

The court of appeals reversed in relevant part. App., *infra*, 128a-191a. The court first held that California law would recognize a negligence claim based on the firearms sales and marketing conduct alleged in the complaint. *Id.* at 148a-161a, 172a-173a. The court rejected defendants' argument that they owed no duty to the shooting victims. Applying California law, the court held that plaintiffs' injuries were a reasonably foreseeable consequence of defendants' conduct and their decision to distribute firearms in the fashion they chose. *Id.* at 148a-153a, 157a-

161a. The court of appeals also rejected the claim that the complaint failed to establish causation. The court predicted that California would follow numerous other States in upholding such claims, ruling that the defendants' breach is not a failure to protect unknown and unknowable victims from harm, but rather affirmative misconduct in distribution and marketing that yielded predictable injuries. *Id.* at 154a-158a. Finally, the court of appeals held that the complaint's allegations that defendants knowingly "facilitat[e] the purchase of guns by individuals declared unfit to buy guns by state and federal legislatures" states a claim for public nuisance. *Id.* at 161a-173a. Judge Hall dissented, *id.* at 171a-191a, and a number of judges dissented from denial of rehearing en banc, *id.* at 192a-208a. This Court denied review. *China North Indus. Corp.* v. *Ileto*, 543 U.S. 1050 (2005). The lawsuit was remanded to the district court for trial.

2. Shortly thereafter, Congress enacted the Protection of Lawful Commerce in Arms Act ("PLCAA" or "Act"), 15 U.S.C. §§ 7901-7903. The PLCAA seeks to eliminate certain causes of action ("qualified civil liability action[s]") entirely, providing that they "may not be brought in any Federal or State court." *Id.* § 7902(a). The PLCAA by its terms applies to fully accrued and already asserted causes of action: A "qualified civil liability action that is pending on October 26, 2005," the PLCAA declares, "shall be immediately dismissed by the court in which the action was brought or is currently pending." *Id.* § 7902(b).

The PLCAA broadly defines "qualified civil liability action" as a civil or administrative action brought by any person against a federally licensed manufacturer, seller, or importer of firearms (or a trade association) for any

sort of fine, penalty, damages, injunctive or other relief, resulting from the criminal or unlawful misuse of a firearm by the plaintiff or a third party. 15 U.S.C. §7903(5)(A). The PLCAA then establishes exceptions, declaring certain actions are not "qualified civil liability actions." *Id.* §7903(5)(A)(i)-(vi). One of those exceptions provides that the term "qualified civil liability action" does not include an action in which (1) a manufacturer or seller of a firearm "knowingly" violated a state or federal statute "applicable to the sale or marketing" of the firearm, and (2) the violation was the proximate cause of the harm for which relief is sought. *Id.* §7903(5)(A)(iii). That exception is often called the "predicate exception," because it exempts suits where there has been a "predicate" violation of an applicable state or federal statute.

In enacting the PLCAA, Congress "found" that the Second Amendment entitles the public to own firearms; that manufacturers and sellers should not be liable for criminal misuse of firearms; and that imposing liability undermines the exercise of Second Amendment rights and burdens interstate commerce. 15 U.S.C. §7901. The PLCAA declares that liability actions "commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others" against gun makers and sellers "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States," and it refers to those who would sustain such claims as "maverick judicial officer[s]." *Ibid.*

Following the PLCAA's enactment, defendants invoked the PLCAA and moved for judgment on the pleadings. The district court granted the motion. App., *infra*, 73a-127a. The court first rejected the argument that the action was not a "qualified civil action" subject to

dismissal because it falls within the "predicate exception" of 15 U.S.C. §7903(5)(A)(iii). The district court acknowledged that, according to the complaint, defendants knowingly violated Cal. Civ. Code §1714(a), which codifies the common-law duty of care, and Cal. Civ. Code §§3479 and 3480, which codify public nuisance under California law. App., *infra*, 113a-115a. The court also acknowledged that those provisions of the California Code are "applicable to the sale or marketing" of firearms in the ordinary sense of those terms—*i.e.*, that they are "capable of being applied" to the sale or marketing of firearms. *Id.* at 93a (internal quotation marks omitted); see also *id.* at 75a-83a, 113a. But the district court nonetheless interpreted the PLCAA to require a predicate violation of a statute that explicitly and exclusively regulates firearms—one that is "specifically applicable" to the issue of firearms marketing and distribution. *Id.* at 112a-114a. Violation of a statute that imposes a more general duty that is applicable to firearms sellers and marketers among others, the court held, was not sufficient. *Id.* at 115a.

The district court also rejected the claims that the PLCAA's retroactive abrogation of fully accrued and asserted claims for compensation violates the Due Process Clause, takes property without just compensation, and violates separation-of-powers and federalism principles. App., *infra*, 115a. The court held that plaintiffs do not have a vested property right in their accrued and partially litigated cause of action; such claims do not amount to property, the court stated, until the plaintiff "has obtained a final, unreviewable judgment." *Id.* at 117a. The court further held that Due Process was satisfied by the legislative process attendant to enactment of the PLCAA and by a judicial hearing on whether

the PLCAA applies to their claims. *Id.* at 119a. Finally, the court held that the PLCAA represents a rational exercise of Congress' Commerce Power. *Id.* at 121-122a. The trial court, however, refused to grant relief to China North because China North is not a federally licensed firearms manufacturer or dealer and thus falls outside the PLCAA's protections. *Id.* at 7a.

3. A divided panel of the Ninth Circuit affirmed. App., *infra*, 1a-72a. The majority opinion began with the scope of the predicate exception for conduct that violates a state or federal statute "applicable to the sale or marketing" of firearms. The court agreed that one "everyday meaning" of the word "applicable," reflected in the "dictionary definition" of that term, is "capable of being applied." *Id.* at 12a (quoting *Black's Law Dictionary* 98 (6th ed. 1990)). It also agreed that, under that definition, defendants' conduct here fell within the exception: It violated provisions of the California Civil Code that, in the Ninth Circuit's prior decision in this case, were held applicable to firearms sales and marketing practices (indeed, to the very conduct at issue in this case). *Id.* at 5a; see also *id.* at 10a. And the court of appeals "acknowledge[d] that the Indiana Court of Appeals" had concluded that the PLCAA's text unambiguously excludes such claims: So long as the defendant violated a state statute (like the California statutes at issue here) that was capable of applying to firearms sales and marketing, the Indiana court had held, the predicate exception excludes the suit from the PLCAA's scope. *Id.* at 15a n.5 (citing *Smith & Wesson Corp.* v. *City of Gary*, 875 N.E.2d 422 (Ind. App. 2007) (transfer denied Jan. 12, 2009)).[1]

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[1] In its earlier decision in this case, the Ninth Circuit noted that the complaint alleges that defendants knowingly create and maintain a

The majority nonetheless held that the term "applicable" was ambiguous in context, and therefore turned to the PLCAA's purpose and history. App., *infra*, 15a-21a. The court held that Congress's purpose had been to preempt general tort theories of liability like those codified by statute in California's Civil Code. *Id.* at 16a. The court also found support for its view in the statements of individual legislators, which identified this case as the sort of matter Congress intended to preempt. *Id.* at 20a-23a. To qualify as a statute "applicable to" firearms sales and marketing, the majority concluded, a state law would "at the very least" need "a direct connection with sales or manufacturing." *Id.* at 14a; see *ibid.* ("The illustrative predicate statutes pertain specifically to sales and manufacturing activities, and most also target the firearms industry specifically.").

The majority also rejected the constitutional challenges to the PLCAA. It held that there was no taking in violation of the Fifth Amendment because accrued tort claims do not constitute protected property interests; the rights in such claims, the court held, do not "vest until final judgment." App., *infra*, 28a. The majority likewise held that the PLCAA does not violate substantive Due Process. Relying principally on *Lyon* v. *Augusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001), the majority held that the

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firearms market intended to provide access to firearms by persons "prohibited to purchase and possess firearms under state and federal law." App., *infra*, 138a (quoting First Amended Complaint); see also *id.* at 136a-137a, 171a. On similar allegations, the Indiana Court of Appeals concluded that, even if the predicate exception were read to require the violation of a regulatory statute specifically governing firearms sales, allegations that the defendant manufacturers and distributors were indirectly involved in illegal sales by dealers and others were sufficient to meet any such requirement. *Gary*, 875 N.E. 2d at 432-434.

Act is not irrational as applied to the fully accrued claims at issue in this case. App., *infra*, 23a, 25a-28a.

The majority also rejected the claim that the PLCAA violates separation-of-powers and federalism principles. The majority reasoned that Congress is permitted to amend the law applicable to pending cases, so long as it does not attempt to impose findings or dictate particular results in specific cases without altering existing law. App., *infra*, 23a-24a. Congress's abrogation of particular state-law claims, the majority held, constitutes a permissible amendment to generally applicable law. *Ibid.* The court did not address, however, whether Congress can abrogate state law based on its substantive disagreement with the state judiciary's construction of that law, as it had here. See 15 U.S.C. §7901 (grounding statute on finding that the preempted liability actions "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States").

Judge Berzon dissented. App., *infra*, 38a-72a. Judge Berzon agreed that the term "applicable" in the predicate exception is ambiguous. *Id.* at 38a. The majority's construction of that term, she stated, was faulty because it unnecessarily propelled the statute headlong into serious constitutional difficulties, including serious doubts about its validity under the Due Process Clause. *Id.* at 38a-39a.

The dissent explained that plaintiffs' accrued causes of action represent a "'species of property protected by the * * * Due Process Clause,'" even "before [being] reduced to [judgment] in a final dollar amount," as "the Supreme Court held in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)." App., *infra*, 45a. She noted that courts have upheld legislation that preempts a cause of action prospectively, or replaces it with an alternative means of

redressing the relevant injury. But, she continued, the courts have "never upheld against substantive due process attack a federal statute" that—like the PLCAA—"completely extinguishes an individual litigant's ability to litigate a cause of action" cognizable under state law, as that action is being litigated, while leaving "no alternative channel by which the individual may address his injury." *Id.* at 44a; see *id.* at 49a ("As interpreted by the majority, the PLCAA retroactively extinguishes Plaintiffs' pending state tort causes of action, *and* it leaves them without *any* remedy for the injuries they claimed they have suffered due to Defendants' unlawful acts.").

For those reasons, the dissent explained, the majority opinion erred in relying on a rational-basis standard from cases like *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978). The statute at issue there (the Price-Anderson Act) did not merely provide an alternative, prospective remedial scheme for tort claims abrogated by the Act; it provided a "scheme that was a 'reasonably just substitute' to the common law." App., *infra*, 50a. The PLCAA, by contrast, deprived these plaintiffs—who suffered serious injury—of *any* remedy against the defendants who caused their injuries. *Id.* at 50a-51a. Various members of this Court and the Court as a whole, Judge Berzon continued, have expressed serious doubt about the constitutionality of abrogating common-law rights without at least "a *compelling showing* of necessity or a provision for a *reasonable alternative remedy*." *Id.* at 52a (quoting *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 98-94 (1980) (Marshall, J. concurring)); see *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 201 (1917) (expressing uncertainty as to whether "a state might, without violence to the constitutional guaranty of due process of law, suddenly set aside

all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute") (internal quotation marks omitted). Justice White had dissented from the denial of certiorari on that very issue, stating that "[w]hether due process requires" a statute abrogating a cause of action "to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States." App., *infra*, 47a (quoting *Fein* v. *Permanente Med. Group*, 474 U.S. 892, 894-95 (1985) (White, J., dissenting from the denial of certiorari)).

The dissent explained that the "predicate exception"—properly read in light of the serious constitutional questions a contrary construction might create—is not limited to violations of statutes that specifically and exclusively address the sale and marketing of guns. App., *infra*, 56a. Rather, it extends to all statutes "applicable" to that conduct, *i.e.*, all statutes "capable" of being applied to that conduct. *Ibid.* But that does not mean the exception swallows the rule: To the contrary, "the key to interpreting the predicate exception is Congress's use of the word 'knowingly.'" *Ibid.* The requirement of "knowing" (as opposed to no-fault or negligent) conduct, the dissent explained, imposes "a heightened requirement that a plaintiff must meet if his lawsuit is to proceed under the PLCAA regime, regardless of whether the underlying statute requires such a mens rea." *Id.* at 58a. In this case, she explained, precisely that "knowing" conduct was alleged. *Id.* at 58a-59a. Thus, plaintiffs here were not "imputing vicarious liability" to defendants for another's misconduct; they instead seek to hold defendants liable for their own unlawful conduct, namely "dangerous

distribution and marketing practices, and the knowing maintenance of a nuisance." *Id.* at 60a. Allowing that sort of claim, she added, is fully consistent with the statute's history. Congress sought to "'prohibit causes of action * * * for the harm *solely* caused by the criminal or unlawful misuse of firearm products or ammunition products by others,'" such as lawsuits seeking to impose strict or vicarious liability for the criminal's act without regard to the defendant's fault. *Id.* at 63a-64a (quoting 15 U.S.C. §7901(b)(1)) (emphasis added). But Congress did not seek to hold tortfeasors harmless for their own knowing misconduct while denying blameless victims their state-law remedies. *Id.* at 64a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's construction of the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§7901-7903, squarely conflicts with the decisions of other courts and adds to growing confusion over the meaning and scope of that statute. Under the Ninth Circuit's decision, moreover, the PLCAA would retroactively extinguish a fully accrued state-law cause of action for compensation—a form of property under state law—without providing any alternative remedial scheme or compensation. The doctrine of constitutional doubt therefore weighs strongly against the Ninth Circuit's construction. The constitutional issues raised by the Ninth Circuit's decision, moreover, themselves represent unsettled issues of constitutional law that have long divided the courts and that therefore warrant this Court's review.

I. THE COURTS ARE DIVIDED ON THE SCOPE OF THE PLCAA

The PLCAA provides that a "qualified civil liability action" cannot "be brought in any Federal or State

court," 15 U.S.C. § 7901(a), and that any such action "that is pending on October 26, 2005, shall be immediately dismissed * * *," *id.* § 7901(b). The PLCAA defines "qualified civil liability action" as a civil or administrative action brought against a federally licensed manufacturer, seller, or importer of firearms (for various forms of relief, including fines, penalties, damages, and injunctions) resulting from the criminal or unlawful misuse of a firearm by the plaintiff or a third party. *Id.* § 7903(5)(A). The PLCAA, however, also declares that the term "qualified civil liability action" does not include an action in which (1) a manufacturer or seller of a firearm "knowingly" violated a state or federal statute "applicable to the sale or marketing" of the firearm, and (2) the violation was the proximate cause of the harm for which relief is sought. *Id.* § 7903(5)(A)(iii). The meaning of this "predicate exception" (which exempts suits where there has been a "predicate" violation of an applicable state or federal statute) has divided the courts.

A. The Courts Are Divided On The Meaning Of The PLCAA'S Predicate Exception

1. In *City of Gary*, 875 N.E.2d at 430-35 (Ind. App. 2007), the Indiana Court of Appeals exhaustively analyzed the text of the predicate exception of § 7903(5)(A)(iii) to determine whether a violation of Indiana's public-nuisance statute would place a resulting action within the scope of the exception. That exception, the court explained, exempts suits against gun manufacturers and distributors from the PLCAA if the manufacturers or distributors have violated a state statute "applicable to" the sale or marketing of firearms. 875 N.E.2d at 431. The court held that Indiana's public-nuisance statute qualifies as a state statute "applicable to" the sale and marketing of guns. The term "applicable

to," the court explained, means "capable of being applied." *Ibid.* And there could be no doubt that suits under Indiana's public-nuisance statute are "capable of being applied" to gun sales and distribution: The Indiana Supreme Court had previously held in that very lawsuit—before the PLCAA's enactment—that the State's public nuisance statute does apply to firearms marketing and distribution practices. *Ibid.* (citing *City of Gary ex rel. King* v. *Smith & Wesson Corp.*, 801 N.E.2d 1222, 1241 (Ind. 2003)).[2] "We cannot say that the word 'applicable' in the predicate exception is ambiguous," the court of appeals declared. *Ibid.* "On the face of the language, Indiana's public nuisance statute appears applicable to the sale or marketing of firearms." *Ibid.*; see also *id.* at 434 ("Based on the language of the predicate exception, the specific context of the predicate exception, and the broader context of the PLCAA, we conclude that the predicate exception is unambiguous.").

The Indiana court of appeals found further support for its ruling in the PLCAA's findings, 15 U.S.C. § 7901(a)(7) and (8), which evinced Congress's intent to eliminate

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[2] The Indiana Supreme Court had ruled that the City of Gary's suit clearly fell within the relevant statute:

> In sum, the City alleges that all defendants intentionally and willingly supply the demand for illegal purchase of handguns. The City alleges that the dealer-defendants have participated in straw purchases and other unlawful retail transactions and that manufacturers and distributors have intentionally ignored these unlawful transactions. The result is a large number of handguns in the hands of persons who present a substantial danger to public safety in the City of Gary. I.C. Sections 35-47-2.5-14, -15. Taken as true these allegations are sufficient to give rise to a public nuisance generated by all defendants.

875 N.E.2d 422, at 426 (quoting 801 N.E.2d at 1241)).

liability actions that "do not represent a bona fide expansion of the *common law*" and "attempt to use the judicial branch to *circumvent the Legislative branch of government.*" 875 N.E.2d at 434-35 (emphasis added). The court explained:

> Indiana's public nuisance statute is a legislative enactment, which the Indiana Supreme Court interpreted as applying to the City's claim. Thus, we conclude that the City's claim is not an attempt to circumvent the legislative branch of government.

875 N.E.2d at 434-35. Likewise, the court of appeals explained, the claims did not seek to impose strict, vicarious, or no-fault liability on the defendants; rather, the claims sought to hold them responsible for their own conduct, which failed to meet state-law standards. *Id.* at 433.

2. In *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 400-03 (2d Cir. 2008), cert. denied, 129 S. Ct. 1579 (2009), the Second Circuit adopted a different construction. In that case, the City of New York had sued various firearms sellers under that State's general nuisance statute. Finding the language of the PLCAA unambiguous, the district court had held that the City's suit fell within the predicate exception. The term "applicable to," the court explained, is defined in the dictionary as meaning "capable of being applied." *City of New York* v. *Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 262 (E.D.N.Y. 2005). And New York's public nuisance statute, PL 240.45, clearly was state legislation "applicable to"—*i.e.*, "capable of being applied" to—gun sales and marketing. *Id.* at 261-264. The district court thus held that, "[b]y its plain meaning, New York PL 240.45 satisfies the language of the predicate exception requir-

ing a 'statute applicable to the sale or marketing of'" firearms. *Id.* at 261.

The Second Circuit reversed. The court of appeals rejected the defendants' contention that a state statute cannot qualify as "applicable to" the sale and marketing of firearms unless it applies solely and exclusively to firearms. 524 F.3d at 400 ("We * * * agree with the District Court's rejection of the Firearms Suppliers' argument that the predicate exception is necessarily limited to statutes that *expressly* regulate the firearms industry."); *ibid.* ("We decline to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute."). "[W]e do not agree that the PLCAA requires that a predicate statute expressly refer to the firearms industry." *Id.* at 401.

But the Second Circuit also rejected the Indiana Court of Appeals' and the district court's reading of the PLCAA's plain text. "[W]e disagree," the Second Circuit ruled, "that the dictionary definition of the term 'applicable' accurately reflects the intent of Congress." 524 F.3d at 400. Instead, the Second Circuit held that the exception requires a predicate violation of a statute "that clearly can be said to regulate the firearms industry." *Id.* at 399-400. Elaborating on that holding further, the Second Circuit ruled that the phrase "applicable to" in the predicate exception "does include statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms," as well as statutes "that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." *Id.* at 404. The Second Circuit also rejected various constitutional challenges to the statute so

construed. *Id.* at 393-99. Judge Katzmann dissented, explaining that the Second Circuit majority's opinion ignores the ordinary meaning of the statutory language; "breaks * * * with longstanding practice of avoiding difficult constitutional questions"; and ultimately adopts an incoherent definition of "applicable to" that will lead to absurd results. *Id.* at 404-08.

3. In the decision below, the Ninth Circuit adopted yet a different construction of the PLCAA's predicate exception. Like the Indiana Court of Appeals in *Gary* and the district court in *City of New York*, the district court in this case had adopted a dictionary definition of the phrase "applicable to"—but not the one those other courts had adopted. The district court conceded that the term "applicable to" is ordinarily understood to mean "capable of being applied" to. App., *infra*, 93a. But it adopted a less-than-ordinary understanding of the term, holding that the phrase "applicable to," as used in the PLCAA, means "specifically capable of being applied to." Accordingly, it held, to fall within the exception, there must be a predicate violation of a statute specifically applicable to the issue of firearms marketing and distribution. *Id.* at 111a.

Departing from dictionary definitions, the Ninth Circuit came up with a different standard still. The Ninth Circuit acknowledged that the "dictionary definition" of "the term 'applicable' is 'capable of being applied.'" App., *infra*, 12a. But it found that meaning too broad. Instead, it held, a statute can qualify as "applicable to" firearms sales and marketing within the meaning of the PLCAA only if, "at the very least," it has "a direct connection with sales or manufacturing." *Id.* at 14a; see *ibid.* ("The illustrative predicate statutes pertain specifically to sales and manufacturing activities, and most also target the fire-

arms industry specifically."). At the same time, it rejected as too narrow the district court's requirement that the statute apply specifically and exclusively to firearms sales. *Ibid.* Judge Berzon dissented. Like Judge Katzmann, she faulted the majority for construing the statute to create rather than resolve constitutional doubt. *Id.* at 53a-55a.

The Ninth Circuit's ruling cannot be reconciled with *Gary* or *City of New York*. Under *Gary*, California's public nuisance and negligence statutes undoubtedly qualify as "applicable to" the sale and marketing of firearms. Just as the Indiana Supreme Court had held that State's public nuisance statute applicable to that conduct before the PLCAA's enactment, *Gary*, 875 N.E.2d at 431, the Ninth Circuit had held those California statutes applicable to the same conduct before the PLCAA's enactment, App., *infra*, 141a-175a. Indeed, California's statutes and Indiana's are virtually indistinguishable.[3]

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[3] As the Indiana Supreme Court observed, that State's "nuisance law is grounded in a statute enacted in 1891, and now appearing at Indiana Code Section 32-30-6-6," which defines a nuisance to include "Whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." 801 N.E.2d at 1229. California's public nuisance statute was codified in 1872 as part of the Civil Code, and similarly defines a nuisance as "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." Cal. Civ. Code § 3479. "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable

Nor can the claims in the complaints be meaningfully distinguished. Both specifically identify improper marketing and sales practices by the defendants that predictably would and do place guns in the hands of criminals.[4]

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number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Cal. Civ. Code § 3480.

[4] While the Indiana Supreme Court held that illegal conduct was not a requirement for public nuisance, it noted that some of the conduct of distributors and manufacturers that was alleged by the City also presumably did violate regulatory statutes governing handgun sales "either directly in the case of the dealers or as knowing accomplices in the case of other defendants." 801 N.E. 2d at 1234-35. The Indiana Court of Appeals relied on those allegations as part of an alternative holding: Even assuming arguendo the predicate exception requires an underlying violation of a "firearms-specific regulatory statute," that court held, the plaintiff had alleged such violations with respect to the manufacturer/distributor defendants by its allegations that they "are on notice of the concentration of illegal handgun sales in a small percentage of dealers, and the ability to control distribution through these dealers, but continue to facilitate unlawful sales by failing to curtail supply." 875 N.E. 2d at 432. Like the complaint in *Gary*, the complaint here alleges that defendants distribute their firearms with the intent of marketing them to illegal purchasers, knowing which distributors and dealers provide guns to illegal purchasers, selecting and developing those "distribution channels they know regularly provide guns to criminals and underage users." App., *infra*, 138a (summarizing the allegations of plaintiffs' complaint). *Gary* purported to distinguish the complaint in this case, 875 N.E. 2d at 433 n.7, relying on the district court's comment that "if plaintiffs were to succeed in their lawsuit, Defendants would have to change their behavior to avoid further liability in California, even if they did not violate any State or federal laws specifically governing the marketing or sale of firearms." *Ibid.* The *Gary* court took that comment to mean that the complaint in this lawsuit does not include allegations like those made in *Gary*, *i.e.*, direct violations of firearms-specific statutes by firearms sellers, and the concomitant indirect violations by manufacturer- and distributor-defendants that knowingly continue to supply such sellers, despite notice and the

The decision below likewise cannot be reconciled with the Second Circuit's decision in *City of New York*. The Second Circuit held that a state statute previously held applicable to the sale and marketing of firearms would qualify as "applicable to" firearms sales and marketing within the meaning of the PLCAA if "courts have applied [that statute] to the sale and marketing of firearms" or the statute "clearly can be said to implicate the purchase and sale of firearms." 524 F.3d at 404. Here, California's statutes meet both requirements. Before the PLCAA's enactment, the Ninth Circuit itself had held the California statutes applicable to the sale and marketing of firearms. See p. 4, *supra*. The relevant laws, moreover, "clearly can be said to implicate the purchase and sale of firearms." For example, California's negligence statute does not merely state that everyone is "responsible * * * for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." Civil Code §1714(a). It specifies that the "*design, distribution, or marketing of firearms and ammunition is not exempt* from the duty to use ordinary care and skill that is required by this section." *Ibid.* (emphasis added).

B. The Issue Is Important And Recurring

As the foregoing authorities attest, the issue is both important and recurring—and the courts are in utter disarray. The district courts have arrived at precisely contrary constructions. The appellate decisions reversing, in turn, arrive at completely different constructions

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ability to control distribution. *Ibid.* The *Gary* court, however, simply misunderstood the district court's comment; the complaint in this case does specifically allege such violations. The majority opinion under review in turn mistakenly relied on the *Gary* court's misunderstanding. See App., *infra*, 15a n.5.

still. A greater range of views, and greater judicial disarray, is difficult to imagine.

The Ninth Circuit's decision in this case, moreover, is simply incorrect. As Judge Katzmann and the Indiana Court of Appeals point out, the phrase "applicable to" has a simple, straightforward, and unambiguous meaning consistent with its dictionary definition—"capable of being applied to." See 524 F.3d at 404 (Katzmann, J., dissenting); 875 N.E. 2d at 431. Under that definition, this suit cannot be dismissed, since the relevant California statutes clearly are "capable of being applied to" and have been applied to the sale and marketing of guns. App., *infra*, 12a, 141a-175a. Moreover, as Judges Katzmann and Berzon both explained, the more expansive (but still conflicting) meanings of the phrase "applicable to" adopted by the majority opinions in the Second and Ninth Circuits cannot be reconciled with one of the most fundamental canons of statutory construction: the rule that courts must construe statutes to avoid rather than create constitutional doubt. 524 F.3d at 404 (Katzmann, J., dissenting); App., *infra*, 53a-55a (Berzon, J., dissenting). As explained in greater detail below, both (differing) constructions adopted by the courts of appeals propel the statute into serious constitutional difficulties by abrogating fully accrued and already asserted causes of action recognized to constitute property under state law, and by invading the domains of the judiciary and the States. See pp. 24-31, *infra*; App., *infra*, 40a-53a (Berzon, J., dissenting).

Unlike the Indiana Court of Appeals' decision, moreover, both the Second and Ninth Circuits' decisions fundamentally misunderstand the purpose of the PLCAA. That statute was designed to preclude common-law liability "for the harm *solely* caused by the criminal

or unlawful misuse of firearm products or ammunition products by others." 15 U.S.C. §7901(b)(1) (emphasis added). Congress's use of the word "solely" demonstrates that Congress did not want gun manufacturers and sellers to be vicariously or strictly liable for the illegal use of their products by others; but it did not seek to exempt them from liability where the harm was *also* caused by their own misconduct (including their violation of statutory duties of care). That Congress did not intend the PLCAA to immunize firearms industry members from their own misconduct is evidenced by the PLCAA's title. That title is the "Protection of *Lawful* Commerce in Arms Act," not the "Protection of *Illegal and Tortious* Commerce in Arms Act." See *Gary*, 875 N.E.2d at 433.

The PLCAA, moreover, reflects Congress's expressed concern that state courts were trenching on the prerogatives of state legislatures by over-expanding the common-law. But that concern is simply inapplicable where, as here, a statute has been violated and the state legislature has gone through the effort of specifying, in the statute itself, that the statute applies to gun manufacture, sales, and marketing no less than any other activity. See Cal. Civil Code §1714(a) (statutory requirement of "ordinary care or skill" applies to the "design, distribution, or marketing of firearms and ammunition"). Finally, it is no answer to claim that such a construction would convert the predicate exception into an exemption that swallows the rule. 524 F.3d at 403. That ignores the fact that the PLCAA, by its terms, requires *knowing* conduct in every case (thereby precluding strict or vicarious liability). App., *infra*, 56a-60a (Berzon, J., dissenting). The PLCAA thus has broad application. But it cannot be

read to utterly destroy accrued state claims, while providing no substitute means of recourse whatsoever.[5]

II. The Constitutional Issues Raised By The Ninth Circuit's Decision Likewise Warrant Review

As explained above—and consistent with this Court's precedents—the Ninth Circuit should have construed the PLCAA to avoid creating serious doubt about that statute's constitutionality. But the Ninth Circuit's resolution of the constitutional issues created by its construction independently warrants further review.

A. The Ninth Circuit's Ruling That Causes Of Action Are Not Property Warrants Review

The complaint in this case asserts statutory causes of action for negligence and public nuisance under California law. Those causes of action were fully accrued and indeed had been asserted and litigated in district court and on appeal when the PLCAA was enacted. California law recognizes that such an accrued cause of action is a protected property interest. *Callet* v. *Alioto*, 210 Cal. 65, 290 P. 438 (1930) (accrued cause of action at common law or under a statute codifying the common law is a "vested property right" entitled to constitutional protection). Under the Constitution, a vested property interest cannot be destroyed or taken by the government without due process and just compensation. By construing the PLCAA to abrogate a protected property interest retroactively—and to provide no alternative remedy, relief or compensation—the Ninth Circuit's construction raises grave doubts about the PLCAA's constitutionality.

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[5] That certain legislators identified this suit as one that would be pre-empted cannot be controlling. They likewise identified the suit in *Gary*—which was allowed to proceed—as a pre-empted action. *Gary*, 875 N.E. 2d at 434 n.13. And such expressions at most reflect the views of individual legislators rather than Congress as whole.

The Ninth Circuit majority brushed aside petitioner's Due Process and Takings Clause challenges to the PLCAA by declaring that a cause of action does not constitute property until it has been reduced to judgment. App., *infra*, 28a. But that assertion cannot be reconciled with precedent. This Court has long recognized that what constitutes "property" is determined by sources of law independent of the Constitution itself, including state common law, and federal courts look generally to the laws of the forum State to determine what constitutes property. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). Here, California law unquestionably recognizes a fully accrued cause of action as a species of property. And this Court too has recognized that a cause of action is a "species of property protected by the * * * Due Process Clause." *Logan*, 455 U.S. at 428, 430-31.

In *Munn* v. *Illinois*, 94 U.S. 113 (1876), this Court recognized that "[r]ights of property which have been created by the common law cannot be taken away without due process." *Id.* at 134. The Court carefully distinguished between a rule of the common law, *which can be changed at any time*, and a property right which has come into being as a result of a rule of common law. That property right is entitled to due process protection, even though the rule under which it was created may change. *Ibid.* ("rights of property that have been created by the common law cannot be taken away without Due Process"). For those reasons, other courts have regularly recognized that property interests in causes of action arise when the action accrues—not when the cause of action is reduced to an enforceable judgment.[6] Indeed, a

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[6] See *Mathis* v. *Eli Lilly & Co.*, 719 F. 2d 134, 141 (6th Cir. 1983) (explaining that in tort claims there is no cause of action and

cause of action for injuries occurring before commencement of a bankruptcy qualifies as "property of the estate" under 11 U.S.C. §541(a)(1), including personal injury causes of action, even where personal injury claims are not assignable. See, *e.g.*, *In re Arnold*, 252 B.R. 778 (9th Cir. BAP 2000); Harold R. Weinberg, *Tort Claims as Collateral: Impact on Consumer Finance*, 49 Consumer Fin. L.Q. Rep. 155, 162 n. 35 (1995).

The fully accrued causes of action for compensation asserted in this case clearly fall into the latter category. They had not merely accrued before the PLCAA's enactment. They also had been litigated all the way to the Ninth Circuit, which had held that petitioner had asserted cognizable claims against defendants under California law. App., *infra*, 141a-175a. The panel opinion's ruling and disregard for state-created property rights creates bizarre and unsetting results: Under it, Congress could not enact a law taking a citizen's real estate and handing it over to his neighbor. But Congress could wait for the neighbor to take it himself and then deprive the rightful owner of all legal redress by retroactively abrogating, with impunity, all state-law causes of action for the recovery of the property or appropriate compensation.

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therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs); *Garcia* v. *Wyeth-Ayerst Labs.*, 385 F.3d 961, 968 (6th Cir. 2004) (upholding a statute of repose against due process challenge because such statutes prevent causes of action from accruing; a litigant has "no vested property right in a cause of action until it accrues"); *Ducharme* v. *Merrill-National Labs.*, 574 F.2d 1307, 1310 (5th Cir. 1978) (rejecting challenge to Swine Flu Act because the plaintiffs' cause of action against vaccine manufacturer "did not arise until after the passage of the Swine Flu Act"; finding "no vested right in a cause of action under Louisiana Civil Code Article 2315" where injury occurred after that provision's pre-emption).

By collapsing this Court's decision in *Munn* into the overbroad assertion that no person has a vested property right in a rule of law—since rules of law can be changed at any time—the panel ignores *Munn*'s critical protection for property interests that have already accrued under a pre-existing rule, interests that *are* entitled to protection under the Due Process and Takings Clauses. Indeed, the majority here upheld a statute that, under the majority's construction, abrogates *state* common-law causes of action *after* a *judicial* determination that the causes of action are cognizable, based on *Congress's* contrary conclusion that such claims represent an unwarranted expansion of state common law.

That ruling warrants this Court's review. As the dissenting opinion below points out, this Court has never upheld against a Due Process or Takings Clause challenge to a federal statute that completely and retroactively extinguishes an individual's ability to litigate an accrued common-law claim, as opposed to limiting recovery, or changing the procedure for suit, or substituting one set of remedies for another. App., *infra*, 49a -53a (Berzon, J., dissenting). "[Q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way." *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. at 98-94 (Marshall, J. concurring); see also *New York Central R.R.*, 243 U.S. at 201 (expressing uncertainty as to whether "a state might, without violence to the constitutional guaranty of due process of law, suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute") (internal quotation marks omitted).

This Court, moreover, has not articulated the standard of review that should apply to such legislation. In *Duke Power*, this Court upheld the Price-Anderson Act, which attempted to encourage the development of nuclear power by *prospectively* limiting damages for nuclear accidents under state tort law, while requiring insurance and other means of ensuring some compensation in the event of a catastrophic failure. In so ruling, the Court determined that the Price-Anderson Act provided a "scheme that was a 'reasonably just substitute' to the common law," 433 U.S. at 88, and therefore reviewed that statute under a forgiving rational-basis test, *id.* at 84. But the Court declined to address whether the result would have been different, or whether a different standard would have applied, if Congress had purported to abrogate existing state-law causes of action (prospectively or retroactively) without providing that "just substitute." *Id.* at 88.

Following *Duke Power*, courts have diverged on the permissibility of such legislation and the proper standard of review. Even in the context of prospective legislation that limits compensation but leaves causes of action otherwise intact, some courts have held such legislation unreasonable absent an adequate quid pro quo, while others have not. As Justice White explained, "[w]hether due process requires" such a statute "to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States." *Fein*, 474 U.S. at 894-95 (1985) (White, J., dissenting from the denial of certiorari); see also *Morris* v. *Savoy*, 576 N.E.2d 765, 770-72 (Ohio 1991) (striking down prospective cap on medical malpractice recoveries under state due process

guarantee because cap seeks to benefit the public at the expense of the rights of those who have been severely injured); cf. *Scholz* v. *Metropolitan Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993) (upholding Colorado statute limiting medical malpractice damages because statute limited a remedy as opposed to a right, and there is no property right in a particular remedy). State courts, moreover, regularly conclude that retroactive application of such enactments would affect substantial rights and therefore reject retroactivity. See Carol A. Crocco, *Validity, Construction and Application of State Statutory Provisions Limiting Amount of Recovery in Malpractice Claims*, 26 A.L.R. 5th 245 § 27 (1994 & Supp. 2009) (citing cases); cf. *Greyhound Food Mgmt., Inc.* v. *City of Dayton*, 653 F. Supp. 1207, 1213-1321 (S.D. Ohio 1986) (striking down statute precluding recovery on insurer's subrogated claim as inconsistent with the Due Process, Takings, and Equal Protection Clauses). The Ninth Circuit's decision adds further confusion into that pre-existing disarray. For that reason, too, the petition for a writ of certiorari should be granted.

B. The Ninth Circuit's Decision Raises Significant Separation-Of-Powers, Federalism and Commerce Clause Issues

The panel majority also ruled that the Commerce Clause provides Congress with the power to retroactively abrogate existing causes of action as they are being litigated. App., *infra*, 26a. But neither the panel majority, nor Congress's findings in the PLCAA itself, anywhere explain the connection between such retroactive legislation and interstate commerce. To the extent the PLCAA encourages certain transactions by exempting gun manufacturers, importers, sellers and marketers from liability to some degree, that might well have the

requisite connection to commerce. But it is hard to see why abrogating causes of action relating to transactions and conduct that took place in the past—well before the PLCAA was enacted—can have any meaningful effect on commerce.

The panel majority ruled that Congress *intended* the PLCAA to apply to this specific case. App., *infra*, 20a. If that is correct, however, that simply creates further constitutional difficulties. It violates the basic rule of judicial independence reflected in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872): Under Article I of the United States Constitution, Congress is vested with legislative powers, but may not itself exercise judicial power. See also *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.4 (1792) ("[N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature, itself, in whom no judicial power of any kind appears to be vested."). "*Klein* holds that Congress may not enact legislation to eliminate an area of jurisdiction in order to control the results in a particular case." Nowak and Rotunda, *Constitutional Law* 38 (6th ed. 2000). Indeed, this intrusion also raises serious federalism issues. Congress did not merely invade the judicial domain. It invaded the judicial domain of *state courts* based on its substantive disagreement with their construction of state tort law. The PLCAA declares that liability actions "commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others" against gun makers and sellers "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States," and it refers to those who would sustain such claims as "maverick judi-

cial officer[s]." 15 U.S.C. §7901. A more obvious intrusion into the judicial role—the proper construction of state common-law—is difficult to imagine.

Relying on *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429, 441 (1992), the panel majority theorized that the PLCAA merely changes the underlying substantive law. But *Robertson* involved a suit by environmental organizations that sought to prevent timber harvesting in old-growth forests, alleging that the harvesting violated certain *federal statutes* regulating such harvesting; it was not a suit for compensation for past injuries to the plaintiffs' own property. While the suit was pending, Congress amended the relevant statutes to allow old-growth harvesting under certain conditions, and applying the changed rules to identified pending as well as future cases. *Id.* at 433-34. Not surprisingly, this Court held the statutory changes did not run afoul of *Klein*, because they changed the underlying federal law. *Id.* at 438-39.

Robertson thus involved Congress's amendment to a *federal* statute to alter the rules governing a dispute over *public* rights—the government's disposition and management of old-growth forest *the government itself owned*. This case, by contrast, involves Congress's putative abrogation of *state-law* causes of action for compensation arising from serious, personal injury. The cases would be comparable only if *Robertson* had involved a private action by a landowner against timber companies for felling timber without permission on the landowner's property, and Congress had enacted a new federal statute declaring that timber companies may not be sued for felling trees *under state tort law* in any court and that all such pending claims must be dismissed—including accrued and pending tort lawsuits for trespass and conversion as well as any for personal injury resulting

from the negligent taking of the timber. Such a statute would be impermissible because it does nothing to change the underlying state tort law. It simply negates that law as to the timber company, and compels the outcome of non-liability for the timber company in the pending lawsuit.

Congress enjoys broad authority to regulate the substance of federal law. But when Congress intervenes in pending cases to overrule judicial holdings on state causes of action, Congress crosses the line. Cf. *Klein*, 80 U.S. (13 Wall.) at 145. To allow Congress to decide that certain state tort claims against certain defendants are frivolous, and to wipe them out on the theory that courts cannot be trusted to adjudicate them, creates serious damage to the constitutional structure and the interests of personal liberty—for "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78, at 466 (Alexander Hamilton).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A
IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 06-56872, 07-15403, 07-15404

LILIAN S. ILETO, AN INDIVIDUAL AND MOTHER TO JOSEPH S. ILETO, DECEASED; JOSHUA STEPAKOFF, A MINOR, BY HIS PARENTS LOREN LIEB AND ALAN B. STEPAKOFF; MINDY GALE FINKELSTEIN, A MINOR, BY HER PARENTS DAVID AND DONNA FINKELSTEIN; BENJAMIN KADISH, A MINOR, BY HIS PARENTS ELEANOR AND CHARLES KADISH; AND NATHAN LAWRENCE POWERS, A MINOR, BY HIS PARENTS GAIL AND JOHN MICHAEL POWERS, FOR HIMSELF AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

GLOCK, INC., A GEORGIA CORPORATION; RSR MANAGEMENT CORPORATION; AND RSR WHOLESALE GUNS SEATTLE INC.,

Defendants-Appellees,

MAADI, AN EGYPTIAN BUSINESS ENTITY; QUALITY PARTS CO., FORMERLY DOING BUSINESS AS BUSHMASTER FIREARMS, A MAINE CORPORATION; IMBEL, A BRAZILIAN BUSINESS ENTITY; THE LOANDER PAWNSHOP TOO, A WASHINGTON CORPORATION; DAVID MCGEE, AN INDIVIDUAL; INTRAC ARMS INTERNATIONAL, INC., A TENNESSEE CORPORATION, FORMERLY DOING BUSINESS AS INTRAC CORPORATION ALSO KNOWN AS DOE 1, AND CHINA NORTH INDUSTRIES CORP., AKA NORINCO,

Defendants,

AND

UNITED STATES OF AMERICA,

Defendant-Intervenor- Appellee.

LILIAN S. ILETO, AN INDIVIDUAL AND MOTHER TO JOSEPH S. ILETO, DECEASED; JOSHUA STEPAKOFF, A MINOR, BY HIS PARENTS LOREN LIEB AND ALAN B. STEPAKOFF; MINDY GALE FINKELSTEIN, A MINOR, BY HER PARENTS DAVID AND DONNA FINKELSTEIN; BENJAMIN KADISH, A MINOR, BY HIS PARENTS ELEANOR AND CHARLES KADISH; AND NATHAN LAWRENCE POWERS, A MINOR, BY HIS PARENTS GAIL AND JOHN MICHAEL POWERS, FOR HIMSELF AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

V.

CHINA NORTH INDUSTRIES CORP., AKA NORINCO,

Defendant-Appellee,

AND

UNITED STATES OF AMERICA,

Defendant-Intervenor- Appellee.

AND

RSR MANAGEMENT CORPORATION; RSR GROUP NEVADA, INC., FORMERLY DOING BUSINESS AS RSR WHOLESALE GUNS SEATTLE INC.; MAADI, AN EGYPTIAN BUSINESS ENTITY; QUALITY PARTS CO., FORMERLY DOING BUSINESS AS BUSHMASTER FIREARMS, A MAINE CORPORATION; IMBEL, A BRAZILIAN BUSINESS ENTITY; THE LOANDER PAWNSHOP TOO, A WASHINGTON CORPORATION; DAVID MCGEE, AN INDIVIDUAL; INTRAC ARMS INTERNATIONAL, INC., A TENNESSEE CORPORATION, FORMERLY DOING BUSINESS AS INTRAC

CORPORATION ALSO KNOWN AS DOE 1; GLOCK, INC., A GEORGIA CORPORATION,

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Defendants.

Appeal from the United States District Court
for the Central District of California

Argued and Submitted Aug. 5, 2008
Filed May 11, 2009

Before: STEPHEN REINHARDT, SUSAN P. GRABER, and MARSHA S. BERZON, Circuit Judges.

Opinion by Judge GRABER; Partial Concurrence and Partial Dissent by Judge BERZON.

GRABER, Circuit Judge:

By enacting the Protection of Lawful Commerce in Arms Act ("PLCAA" or "Act"), 15 U.S.C. §§ 7901-7903, Pub.L. No. 109-92, 119 Stat. 2095 (2005), Congress has protected federally licensed manufacturers and sellers of firearms from most civil liability for injuries independently and intentionally inflicted by criminals who use their non-defective products. Under the terms of the PLCAA, the claims brought here, by the victims of a criminal who shot them, against a federally licensed manufacturer and a federally licensed seller of firearms must be dismissed. But the claims brought against an unlicensed foreign manufacturer of firearms may proceed. We therefore affirm.

FACTUAL AND PROCEDURAL HISTORY

On August 10, 1999, Bufford Furrow shot and injured three young children, one teenager, and one adult at a Jewish Community Center summer camp in Granada Hills, California. Later that day, he shot and killed Joseph Ileto, a postal worker. Furrow was carrying at least seven firearms, which he possessed illegally.

In 2001, the shooting victims and Ileto's surviving wife filed this action against the manufacturers, marketers, importers, distributors, and sellers of the firearms. They alleged that Defendants intentionally produce, market, distribute, and sell more firearms than the legitimate market demands in order to take advantage of resales to distributors that they know or should know will, in turn, sell to illegal buyers. They also alleged that Defendants' deliberate and reckless marketing and distribution strategies create an undue risk that their firearms would be obtained by illegal purchasers for criminal purposes.[1] They did not, however, allege that Defendants violated any statute prohibiting manufacturers or sellers from aiding, abetting, or conspiring with another person to sell or otherwise dispose of firearms to illegal buyers. Instead, Plaintiffs brought their claims against Defendants solely under California common law tort statutes for foreseeably and proximately causing injury, emotional distress, and death through knowing, intentional, reckless, and negligent conduct.

In 2002, the district court dismissed the case for failure to state a claim under California law. *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040 (C.D. Cal. 2002). We affirmed in part and reversed in part. *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003) ("*Ileto I*"). We held that Plaintiffs stated cognizable negligence and public nuisance claims under California law with respect to the firearms actually used in the shootings. *Id.* at 1203-15. We therefore reversed the dismissal of the action against Defendants

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[1] Although Plaintiffs alleged knowing conduct by Defendants, the underlying factual basis for the claims is, of course, Furrow's criminal acts. Had the tragic shootings not occurred, there would be neither damages, nor cognizable claims, nor standing by Plaintiffs to bring these claims.

RSR Management Corp. and RSR Wholesale Guns Seattle Inc. (collectively "RSR"), Glock Inc., and China North Industries Corp. ("China North"), because Plaintiffs alleged that Furrow may have used the firearms manufactured and distributed by those Defendants. *Id.* at 1215-16. We affirmed the dismissal of the action against all other Defendants, however, because the allegations did not support a conclusion that Furrow fired the firearms associated with those Defendants. *Id.* at 1216.

That holding resulted in disagreement within our court. The majority of our colleagues declined, however, to take the case en banc. *Ileto v. Glock Inc.*, 370 F.3d 860 (9th Cir. 2004) (order denying rehearing). As noted in our opinion our holding was not an outlier: Other jurisdictions had upheld similar claims against manufacturers and distributors of firearms under other state laws. *Ileto I*, 349 F.3d at 1200 n. 10, 1206-07, 1214 & n. 30 (citing *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7, 750 N.E.2d 1055, 1061 (2001); *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136, 1142 (2002); *City of Chicago v. Beretta U.S.A. Corp.*, 337 Ill. App. 3d 1, 271 Ill. Dec. 365, 785 N.E.2d 16, 24 (2002), *rev'd*, 213 Ill. 2d 351, 290 Ill. Dec. 525, 821 N.E.2d 1099 (2004)).

The dispute soon reached the floor of the United States Congress and, in 2005, Congress enacted the PLCAA. The PLCAA generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products. The PLCAA affects future and pending lawsuits, and courts are required to "immediately dismiss[ ]" any pending lawsuits preempted by the PLCAA. 15 U.S.C. § 7902(b).

After enactment of the PLCAA, the district court halted discovery and sought briefing on the effect of the Act on this case. Plaintiffs argued that the PLCAA did not apply here and, in the alternative, that the PLCAA is unconstitutional. The district court permitted the United States to intervene, pursuant to 28 U.S.C. § 2403(a), to defend the constitutionality of the Act.

In a published opinion, the district court dismissed Plaintiffs' claims against Defendants Glock and RSR. *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006). The court held that the PLCAA preempted Plaintiffs' claims against those Defendants, *id.* at 1284-98, and upheld the constitutionality of the Act, *id.* at 1298-1304. The court eventually entered a final judgment pursuant to Federal Rule of Civil Procedure 54(b) as to Defendants Glock and RSR. Plaintiffs timely appealed.

In an unpublished order, the district court denied Defendant China North's motion for summary judgment. The court held that the PLCAA did not preempt Plaintiffs' claims against China North because, by contrast to Glock and RSR, China North is not a federal firearms licensee, as required by the PLCAA. The district court then certified an interlocutory appeal of that order.

We consolidated the appeals. In addition to the parties, the United States appears before us as an intervenor in support of the constitutionality of the PLCAA, and we accepted an amicus curiae brief from the Legal Community Against Violence in support of Plaintiffs.

STANDARD OF REVIEW

All the questions presented here are questions of law that we review de novo. *See United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007) ("[T]he constitutionality of a federal statute [is] a question of law that we review de novo."); *J. & G. Sales Ltd. v. Truscott*, 473 F.3d 1043,

1047 (9th Cir.) ("We apply a de novo standard of review to . . . questions of statutory interpretation."), *cert. denied*, --- U.S. ----, 128 S. Ct. 208, 169 L. Ed. 2d 146 (2007); *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999) ("This court reviews de novo Rule 12(c) judgments on the pleadings.").

DISCUSSION

A. *Preemption of Claims Against Defendants Glock and RSR*

The PLCAA requires that federal courts "immediately dismiss[ ]" a "qualified civil liability action." 15 U.S.C. § 7902(b).

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [specified enumerated exceptions.]

Id. § 7903(5)(A). We agree with the parties that this case meets all the elements of that general definition as applied to Defendants Glock and RSR. This case is a "civil action" brought by a "person" for damages and other relief to redress harm "resulting from the criminal . . . misuse of a qualified product by . . . a third party." *Id.* Additionally, Glock and RSR are "manufacturer[s] or seller[s] of a qualified product," *id.*, because they are, respectively, a federally licensed manufacturer and a federally licensed distributor of the firearms allegedly used in the shootings, see *id.* § 7903(2) (defining "manufacturer"); id. § 7903(6) (defining "seller").

The PLCAA therefore requires dismissal if none of the specified exceptions applies. Plaintiffs argue that the third exception, § 7903(5)(A)(iii), applies. Under that exception, the PLCAA does not preempt

> an action in which a manufacturer or seller of a qualified product *knowingly violated a State or Federal statute applicable to the sale or marketing of the product*, and the violation was a proximate cause of the harm for which relief is sought, including—
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> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
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> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18[.]

Id. § 7903(5)(A)(iii) (emphasis added).

This exception has come to be known as the "predicate exception," because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a "predicate statute." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2d Cir. 2008),

cert. denied, -- U.S. —, 129 S. Ct. 1579, 173 L. Ed. 2d 675 (2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 168 (D.C. 2008), *cert. denied*, — U.S. —, 129 S. Ct. 1579, 173 L. Ed. 2d 675 (2009); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. Ct. App. 2007). That is, a plaintiff must allege a knowing violation of "a State or Federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). In *City of New York*, for instance, the plaintiffs brought a common-law public nuisance claim (the cause of action) and also alleged that the defendants knowingly violated a state criminal statute (the predicate statute). 524 F.3d at 390.

Here, we previously ruled that Plaintiffs' negligence and public nuisance allegations state cognizable claims under California law.[2] *Ileto I*, 349 F.3d at 1209, 1215. To meet the requirements of the predicate exception, Plaintiffs do not point to an allegation of a knowing violation of any *separate* statute. Instead, Plaintiffs point out that, unlike many jurisdictions, California's general tort law is codified in its civil code. *See* Cal. Civ. Code § 1714(a) (negligence); *id.* § 3479 (nuisance); id. § 3480 (public nuisance). Plaintiffs argue that their allegations of knowing violations of those statutes satisfy the requirements of the predicate exception. In short, Plaintiffs argue that California Civil Code sections 1714, 3479, and 3480

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[2] We decline to revisit that holding. *See Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) ("Under the 'law of the case' doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." (brackets and some internal quotation marks omitted)). Contrary to Defendants' assertion, the intervening case *People v. Arcadia Mach. & Tool, Inc.* (In re Firearm Cases), 126 Cal. App. 4th 959, 24 Cal. Rptr. 3d 659 (2005), does not conflict with our previous holding.

("California tort laws"), provide both the cause of action *and* the requisite predicate statute under the PLCAA. Defendants counter that only a separate statute, regulating firearms exclusively (or at least explicitly), can be a predicate statute.

The parties' disagreement, then, is whether the California tort laws are predicate statutes under the PLCAA. More specifically, the parties dispute whether the California tort statutes are "applicable to the sale or marketing of [firearms [3]]." 15 U.S.C. § 7903(5)(A)(iii). When interpreting a statute, we look first to its text. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."); *FMC Corp. v. Holliday*, 498 U.S. 52, 57, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990) ("We begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (internal quotation marks omitted)). "If the statute's terms are ambiguous, we may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006).

1. *Text of the Predicate Exception*

"The plainness or ambiguity of statutory [text] is determined by reference to the [text] itself, the specific context in which that [text] is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at

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[3] The statute covers both firearms and ammunition. Except as otherwise specified, we will refer to "firearms" as a convenient shorthand for "firearms and ammunition."

341, 117 S. Ct. 843. Here, the statutory text states that a predicate statute is "a State or Federal statute applicable to the sale or marketing of [firearms]." 15 U.S.C. § 7903(5)(A)(iii). There is no dispute that the California tort laws, which are codified in the California Civil Code, are state statutes. The issue is whether those statutes are "applicable" to the sale or marketing of firearms within the meaning of the PLCAA.

As discussed below, Plaintiffs and Defendants present competing definitions of the term "applicable." Like most terms, "applicable" does not have only one meaning when viewed in isolation. Not surprisingly then, courts have struggled to determine the meaning of "applicable" as used in a variety of statutes. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (statute governing medical devices); *McGee v. Peake*, 511 F.3d 1352 (Fed. Cir. 2008) (statute governing the United States Court of Appeals for Veterans Claims); *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350 (D.C. Cir. 2006) (statute governing the Federal Motor Carrier Safety Administration).

One everyday meaning, and a dictionary definition, of the term "applicable" is "capable of being applied." Black's Law Dictionary 98 (6th ed. 1990). Plaintiffs urge us to conclude that this expansive definition is the only possible meaning of the term "applicable" in the PLCAA's predicate exception. Under that definition, Plaintiffs would prevail: Because we held in *Ileto I* that Plaintiffs' claims concerning the sale and marketing of firearms are cognizable, the California tort laws are "[capable of being applied to] the sale or marketing of [firearms]."

By contrast, Defendants argue that Congress intended a very narrow use of the term "applicable," which can mean "relevant" or "applicable specifically." Defendants argue that, under that narrow meaning of the term, the requirements of the predicate exception would be met only if a plaintiff alleged a knowing violation of a statute that pertained *exclusively* to the sale or marketing of firearms. The dictionary captures this narrower definition, *see Black's Law Dictionary* at 98 (defining "applicable" as "relevant"), and so does everyday usage.[4]

We are convinced at the outset, then, that the term "applicable" has a spectrum of meanings, including the two poles identified by the parties. To determine Congress' intended meaning in the PLCAA, we must examine "the specific context in which [the term 'applicable'] is used[ ] and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341, 117 S. Ct. 843.

Congress listed examples of predicate statutes in the PLCAA:

> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any

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[4] For instance, if someone says, "the following rules are applicable to the game of basketball," one would expect to hear a list of rules concerning traveling, foul shots, and the like. One would *not* expect to hear that force equals mass times acceleration or that an object falls at an increasing rate of 9.8 meters per second per second. The rules of physics undeniably apply to the game of basketball in the broad sense of the term "applicable," but a speaker who listed those rules would almost certainly be doing so for comic effect.

> fact material to the lawfulness of the sale or other disposition of a qualified product; or
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> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18[.]

15 U.S.C. § 7903(5)(A)(iii). We conclude from those illustrations that Plaintiffs' asserted meaning of "applicable" appears too broad, but that Defendants' proposed restrictive meaning appears too narrow. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961) (noting that "a word is known by the company it keeps"); *Cal. State Legislative Bd. v. Dep't of Transp.*, 400 F.3d 760, 763 (9th Cir. 2005) ("[T]he general term should be defined in light of the specific examples provided.").

The illustrative predicate statutes pertain specifically to sales and manufacturing activities, and most also target the firearms industry specifically. Those examples suggest that Plaintiffs' proposed all-encompassing meaning of the term "applicable" is incorrect, because each of the examples has—at the very least—a direct connection with sales or manufacturing. Indeed, if *any* statute that "could be applied" to the sales and manufacturing of firearms qualified as a predicate statute, there would be no need to list examples at all. Similarly, the examples suggest that Defendants' asserted narrow meaning is incorrect, because some of the examples do not pertain exclusively to the firearms industry.

In conclusion, we hold that, viewed in isolation, the term "applicable" has a range of meanings. The context in which the term appears in the PLCAA suggests that neither Plaintiffs' nor Defendants' asserted meaning is wholly correct. In any event, we conclude, as did the Second Circuit, *City of New York*, 524 F.3d at 401, that the text of the statute alone is inconclusive as to Congress' intent.[5] We thus are left to examine the additional indicators of congressional intent. *Jonah R.*, 446 F.3d at 1005.

2. *The Purpose of the PLCAA*

Congress enacted the PLCAA in response to "[l]awsuits . . . commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3). Congress found that manufacturers and sellers of firearms "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended." *Id.* § 7901(a)(5). Congress found egregious "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others." *Id.* § 7901(a)(6). Congress reasoned that

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[5] We acknowledge that the Indiana Court of Appeals reached the opposite conclusion. *City of Gary*, 875 N.E.2d at 434. We find that case to have limited persuasive value, though, in part because the court's decision rested, in the alternative, on the fact that the plaintiffs there had alleged violations of the state's *statutory firearm regulations*. *Id.* at 432-33 & n. 7. No such allegations are made here. Indeed, the *City of Gary* court distinguished the facts of this case on that basis. *See id.* at 433 n. 7 ("Here, unlike in *Ileto*, the City alleged activity on the part of the Manufacturers that facilitates unlawful sales and violates regulatory statutes.").

"[t]he liability actions . . . are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." *Id.* § 7901(a)(7).

The PLCAA's stated primary purpose is:

> To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

Id. § 7901(b)(1).

In view of those congressional findings and that statement of purpose, Congress clearly intended to preempt common-law claims, such as general tort theories of liability.[6] Plaintiffs' claims—"classic negligence and nuisance," *Ileto I*, 349 F.3d at 1202—are general tort theories of liability that traditionally have been embodied

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[6] That conclusion is bolstered by Congress' inclusion of the second exception to preemption: The PLCAA does not preempt claims against a seller of firearms for negligent entrustment or negligence per se. 15 U.S.C. § 7903(5)(A)(ii). That exception demonstrates that Congress consciously considered how to treat tort claims. While Congress chose generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se). *Cf. Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("[W]here . . . Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (brackets and internal quotation marks omitted)). Plaintiffs have not argued that their claims fall under this exception.

in the common law. With this background in mind, which strongly suggests that Congress intended to preempt Plaintiffs' claims, we turn to the predicate exception at issue here.

The predicate exception covers causes of action that allege knowing violations of a state or federal *statute* applicable to the sale or marketing of firearms. Plaintiffs argue that this exception covers *all state statutes that could be applied* to the sale or marketing of firearms. Because California long ago codified its common law into the California Civil Code, Plaintiffs argue that its general tort claims fall within this exception. We disagree for three reasons.

First, although the California legislature codified its common law,

> it was not the intention of the Legislature in enacting section 1714 of the Civil Code, as well as other sections of that code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Li. v. Yellow Cab Co. of Cal., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226, 1233 (1975). In other words, although California has codified its common law, the evolution of those statutes is nevertheless subject to the same "judicial evolution" as ordinary common-law claims in jurisdictions that have not codified common law. That "judicial evolution" was precisely the target of the PLCAA:

> The liability actions . . . are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States.

15 U.S.C. § 7901(a)(7).

Second, congressional findings speak to the scope of the predicate exception. Against the backdrop of Congress' findings on the unjustified "expansion of the common law," *id.*, Congress also found that "[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws," *id.* § 7901(a)(4). We find it more likely that Congress had in mind only these types of statutes—statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry—rather than general tort theories that happened to have been codified by a given jurisdiction.

Third, Plaintiffs' argument leads to a result that is difficult to square with Congress' intention to create national uniformity. If Plaintiffs' view is correct, then general tort theories of liability *are not* preempted by the PLCAA in those states, like California, that have codified its common law. But, at the same time, those same theories of liability *are* preempted by the PLCAA in the states that have not codified their common law.

In conclusion, an examination of the text and purpose of the PLCAA shows that Congress intended to preempt

general tort theories of liability even in jurisdictions, like California, that have codified such causes of action.

3. *Legislative History*

We make two general observations from our review of the extensive legislative history of the PLCAA.[7] First, all of the congressional speakers' statements concerning the scope of the PLCAA reflected the understanding that manufacturers and sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations. *See, e.g.*, 151 Cong. Rec. S9087-01 (statement of Sen. Craig) ("This bill does not shield [those who] . . . have violated existing law . . . and I am referring to the Federal firearms laws."); *id.* S9217-02 (statement of Sen. Hutchison) ("[Lawsuits] would also be allowed where there is a knowing violation of a firearms law."); *id.* (statement of Sen. Craig reading a *Wall Street Journal* article) ("The gun makers . . . would continue to face civil suits for defective products or for violating sales regulations."); *id.* (statement of Sen. Reed in opposition to the PLCAA) ("We will let [plaintiffs] proceed with their suit if there is a criminal violation or a statutory violation, a violation of regulations, but for the vast number of other responsibilities we owe to each other, that are defined for the civil law, one will not have the opportunity to go to court."); *id.* S8927-01 (statement of Sen. Reed) (stating that the PLCAA would not apply to violations of "statutes related to the sale or manufacturing of a gun"); *id.* S9246-02 (statement of Sen. Santorum) ("This bill provides carefully tailored protections that continue to allow legitimate suits based on

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[7] We are indebted to the district court for its exhaustive analysis of the legislative history. *Ileto*, 421 F. Supp. 2d at 1292-96; *see also City of New York*, 524 F.3d at 403-04 (discussing the legislative history of the Act).

knowing violations of Federal or State law related to gun sales.").

Second, congressional speakers referred to *this very case* as the type of case they meant the PLCAA to preempt. *See* 151 Cong. Rec. E2162-03 (statement of Rep. Stearns) ("I want the Congressional Record to clearly reflect some specific examples of the type of predatory lawsuits this bill will immediately stop[:] . . . [An] example is the case of *Ileto v. Glock*, in Federal court in Los Angeles, CA."); *id.* (statement of Sen. Craig) ("I want to give some examples of exactly the type of predatory lawsuits this bill will eliminate. . . . [An] example of a lawsuit captured by this bill is the case of *Ileto v. Glock*, pending in Federal court in Los Angeles, CA."); *see also Adames v. Sheahan*, 378 Ill. App. 3d 502, 316 Ill. Dec. 823, 880 N.E.2d 559, 586 (2007) (noting that "Congress was primarily concerned with novel nuisance cases like *Ileto*"), *rev'd on other grounds*, 233 Ill. 2d 276, 330Ill. Dec. 720, --- N.E.2d ----, No. 105789, 2009 WL 711297 (Ill. Mar. 19, 2009).

We are mindful of the limited persuasive value of the remarks of an individual legislator. *See, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) ("[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."); *Brock v. Writers Guild of Am., W., Inc.*, 762 F.2d 1349, 1356 (9th Cir. 1985) ("The remarks of legislators opposed to legislation are entitled to little weight in the construction of statutes."). Nevertheless, the unanimously expressed understanding of the scope of the PLCAA assists our analysis, particularly when that expressed understanding is in complete har-

mony with the congressional purpose and the statutory text.

4. *Conclusion*

"Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Altria Group, Inc. v. Good*, — U.S. —, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008) (quoting *Medtronic, Inc.*, 518 U.S. at 485, 116 S. Ct. 2240) (some internal quotation marks omitted). The purpose of the PLCAA leads us to conclude that Congress intended to preempt general tort law claims such as Plaintiffs', even though California has codified those claims in its civil code.[8] Our examination of the legislative history of the Act further confirms that conclusion. Accordingly, we hold that the district court correctly held that Plaintiffs' California tort claims against Defendants Glock and RSR are pre-empted by the PLCAA.[9]

B. *Constitutionality of the PLCAA*

Decrying primarily the retroactive aspects of the Act, Plaintiffs argue that the PLCAA is unconstitutional on its face and as applied. We note at the outset that "retroactive statutes raise particular concerns." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Indeed,

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[8] The constitutional avoidance doctrine therefore does not apply. *See Boumediene v. Bush*, — U.S. —, 128 S. Ct. 2229, 2271, 171 L. Ed. 2d 41 (2008) ("The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. We cannot ignore the text and purpose of a statute in order to save it." (citation omitted)); *see also supra* Part B.4.

[9] We need not, and do not, express any view on the scope of the predicate exception with respect to any other statute.

> [t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id.

The strongest protection that federal courts give to those concerns, however, is a requirement that Congress manifest the retroactive nature of legislation with "clear intent." *Id.* at 272, 114 S. Ct. 1483. "[A] requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268, 114 S. Ct. 1483; *see also id.* at 272-73, 114 S. Ct. 1483 ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."). "Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate." *Id.* at 273, 114 S. Ct. 1483.

Where, as here, Congress has expressed its clear intent that the legislation be retroactive, "the *constitutional* impediments to retroactive civil legislation are now modest." *Id.* at 272, 114 S. Ct. 1483; *see also id.* at 267, 114 S. Ct. 1483 ("The Constitution's restrictions, of course, are of limited scope."). "[T]he potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." *Id.* "Retroactivity provisions often serve entirely

benign and legitimate purposes, [including] . . . simply to give comprehensive effect to a new law Congress considers salutary." *Id.* at 267-68, 114 S. Ct. 1483.

Additionally, we note that the only function of the PLCAA is to preempt certain claims. The practical effect of the PLCAA is thus to shift the economic burden for those claims from the firearms industry to the would-be plaintiffs. "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . ." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. . . ." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984).

With that background understanding, we address each of Plaintiffs' constitutional challenges. Like all appellate courts that have assessed the constitutionality of the PLCAA, *City of New York*, 524 F.3d at 392-98; *Adames*, 2009 WL 711297, at *20-21, — Ill. 2d at — - —, — Ill. Dec. at — - —, — N.E.2d at — - —; *District of Columbia*, 940 A.2d at 172-82, we hold that the Act is constitutional on its face and as applied.

1. *Separation of Powers*

Plaintiffs argue that, on its face, the PLCAA violates the constitutional requirement of separation of powers because, by enacting that Act, Congress impinged on the role of the judiciary. It has long been recognized that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147, 20 L. Ed. 519 (1872). "Whatever the precise scope of

Klein, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992)). "Thus, if a statute 'compel [s] changes in the law, not findings or results under old law,' it merely amends the underlying law, and is therefore not subject to a *Klein* challenge." *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 187 (3d Cir. 1999) (alteration in original) (quoting *Robertson*, 503 U.S. at 438, 112 S. Ct. 1407).

Here, Congress has amended the applicable law; it has not compelled results under old law. The PLCAA sets forth a new legal standard—the definition (with exceptions) of a "qualified civil liability action"—to be applied to all cases. As we explained in *Catholic Social Services, Inc. v. Reno*, 134 F.3d 921, 926 (9th Cir. 1997) (per curiam), the Supreme Court in *Robertson* "held that a statute affecting pending cases, indeed designating them by name and number, did not offend separation of powers because Congress was changing the law applicable to those cases rather than impermissibly interfering with the judicial process." Here, Plaintiffs' argument that the PLCAA runs afoul of *Klein* is even less compelling than the argument in *Robertson* because the PLCAA applies generally to all cases, both pending and future.

We likewise reject Plaintiffs' alternative argument that the PLCAA violates the Supreme Court's holding in *Plaut* that Congress cannot "overrule[ ] 'the judicial department with regard to a particular case or controversy.'" (Quoting *Plaut*, 514 U.S. at 227, 115 S. Ct. 1447.) As the quoted sentence makes clear, that rule applies to *final* decisions by the judiciary, not to pending cases. *See*

id. ("[E]ach court, at every level, must decide [a case] according to existing laws. *Having achieved finality, however*, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy [and cannot be overruled by congressional act]." (emphasis added) (citation and internal quotation marks omitted)). The PLCAA applies only to pending and future cases and does not purport to undo final judgments of the judiciary. The mere fact that members of Congress wanted to preempt *this* pending case by name does not change our analysis.

For those reasons, we hold that the PLCAA does not violate the constitutional separation of powers. *See also City of New York*, 524 F.3d at 395-96 (holding that the PLCAA does not violate separation of powers doctrine); *District of Columbia*, 940 A.2d at 172-73 (same).

2. *Equal Protection, Substantive Due Process, and Takings*

Plaintiffs next argue that the PLCAA violates equal protection and substantive due process principles because the Act is an unconstitutional exercise of congressional power that cannot withstand rational basis review. Plaintiffs face an uphill battle: "[B]arring irrational or arbitrary conduct, Congress can adjust the incidents of our economic lives as it sees fit. Indeed, the Supreme Court has not blanched when settled economic expectations were upset, as long as the legislature was pursuing a rational policy." *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001) (citations omitted); *see also Pension Benefit*, 467 U.S. at 729, 104 S. Ct. 2709 ("Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative

and executive branches[.]"); *Usery*, 428 U.S. at 15, 96 S. Ct. 2882 ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.").

There is nothing irrational or arbitrary about Congress' choice here: It saw fit to "adjust the incidents of our economic lives" by preempting certain categories of cases brought against federally licensed manufacturers and sellers of firearms. In particular, Congress found that the targeted lawsuits "constitute[ ] an unreasonable burden on interstate and foreign commerce of the United States," 15 U.S.C. § 7901(a)(6), and sought "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce," *id.* § 7901(b)(4).[10] Congress carefully constrained the Act's reach to the confines of the Commerce Clause. *See, e.g., id.* § 7903(2) (including an interstate- or foreign-commerce element in the definition of a "manufacturer"); *id.* § 7903(4) (same: "qualified product"); *id.* § 7903(6) (same: "seller").

Plaintiffs disagree with Congress' judgment in this regard. In their view, the firearms industry is subject to relatively few lawsuits compared to other major industries and, in any event, the pending lawsuits could not possibly have an appreciable effect on the firearms in-

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[10] We note that Congress also included findings and statements of purpose related to its interest in protecting individuals' Second Amendment right to bear arms. 15 U.S.C. § 7901(a)(1) & (2); *id.* § 7901(b)(2). In their briefs, Plaintiffs argued that the government has no such legitimate interest, but the Supreme Court has since disagreed. *District of Columbia v. Heller*, — U.S. ---, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

dustry (and, by extension, on interstate or foreign commerce). We need not tarry long on these considerations, because our only task is to consider whether Congress' chosen allocation was "irrational or arbitrary." *Lyon*, 252 F.3d at 1086; *Usery*, 428 U.S. at 15, 96 S. Ct. 2882; *see also Pierce County v. Guillen*, 537 U.S. 129, 147, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003) (upholding a Commerce Clause challenge because "Congress could reasonably believe" that the statute affected interstate commerce). We have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected. And "it was eminently rational for Congress to conclude that the purposes of the [PLCAA] could be more fully effectuated if its ... provisions were applied retroactively." *Pension Benefit*, 467 U.S. at 730, 104 S. Ct. 2709; *see also City of New York*, 524 F.3d at 395 ("We find that Congress has not exceeded its authority in this [PLCAA] case, where there can be no question of the interstate character of the industry in question and where Congress rationally perceived a substantial effect on the industry of the litigation that the Act seeks to curtail."); *District of Columbia*, 940 A.2d at 175 ("Thus the PLCAA ... is reasonably viewed as an 'adjust[ment of] the burdens and benefits of economic life' by Congress, one it deemed necessary in exercising its power to regulate interstate commerce." (alteration in original) (quoting *Usery*, 428 U.S. at 15, 96 S. Ct. 2882)); *Adames*, 233 Ill. 2d at ---- - ---, 330 Ill. Dec. at ---- - ----, 909 N.E.2d at ---- - ----, 2009 WL 711297, at *20-21 (similarly rejecting a Commerce Clause challenge to the PLCAA).

Plaintiffs argue, in the alternative, that both equal protection and substantive due process principles require

us to conduct a more searching review. Plaintiffs cite *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), but they fail to identify—and we fail to see—any suspect classification common to those adversely affected by the PLCAA.

Plaintiffs also argue that greater scrutiny is required because they have a vested property right in their accrued state-law causes of action. Plaintiffs' premise is incorrect: "We have squarely held that although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." *Lyon*, 252 F.3d at 1086 (emphasis and internal quotation marks omitted); *see also Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005) ("Causes of action are a species of property protected by the Fourteenth Amendment's Due Process Clause. However, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." (citation, internal quotation marks, and emphasis omitted)); *Austin v. City of Bisbee*, 855 F.2d 1429, 1435 (9th Cir. 1988) (explaining that, although a cause of action is a species of property, "it is inchoate and affords no definite or enforceable property right until reduced to final judgment" (internal quotation marks omitted)).

Plaintiffs' argument that the PLCAA effects an unconstitutional taking without just compensation fails for the same reason. *See Landgraf*, 511 U.S. at 266, 114 S. Ct. 1483 ("The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of *vested* property rights . . . ." (emphasis added)); *see also Concrete Pipe & Prods. of Cal. Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641, 113 S. Ct. 2264, 124 L. Ed. 2d 539

(1993) ("Given that [the petitioner's] due process arguments are unavailing, it would be surprising indeed to discover [that] the challenged statute nonetheless violat[ed] the Takings Clause."); *District of Columbia*, 940 A.2d at 180-82 (rejecting a Takings Clause challenge to the PLCAA).

3. *Procedural Due Process*

Plaintiffs next argue that the PLCAA violates their procedural due process rights because their pending lawsuit was abridged without adequate hearing. "As [the Supreme Court's] decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982).

In *Logan*, state law required a state commission to conduct a fact-finding conference within 120 days of receiving of an employment discrimination complaint. *Id.* at 424, 102 S. Ct. 1148. The plaintiff filed a timely complaint, but the commission inadvertently convened the conference after the 120-day deadline. *Id.* at 424-25, 102 S. Ct. 1148. The Illinois Supreme Court held that the Commission therefore lacked jurisdiction over the complaint because the 120-day deadline was jurisdictional, and rejected the plaintiff's due process arguments. *Id.* at 426-27, 102 S. Ct. 1148.

The United States Supreme Court reversed. The Court held that the plaintiff had a protected property interest in her claim and "that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest." *Id.* at 433, 102 S. Ct. 1148 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 n. 8, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). "To put it as plainly as possible, the State may not finally des-

troy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id.* at 434, 102 S. Ct. 1148.

But the Court explicitly limited its holding to "a procedural limitation on the claimant's ability to assert his rights, not a substantive element of the [underlying] claim." *Id.* at 433, 102 S. Ct. 1148. The Court explained:

> Of course, the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs. The Court held as much in *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980), where it upheld a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity arguably did deprive the plaintiffs of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels. *In each case, the legislative determination provides all the process that is due.*

Id. at 432-33, 102 S. Ct. 1148 (some citations omitted) (emphasis added).

Here, the PLCAA does not impose a procedural limitation; rather, it creates a substantive rule of law granting immunity to certain parties against certain types of claims. In such a case, "the legislative determination provides all the process that is due." *Id.* at 433, 102 S. Ct. 1148. On the substantive question created by the PLCAA—whether this case meets the definition of a "qualified civil liability action"—Plaintiffs were, of

course, afforded an ample hearing before the district court. We therefore hold that the PLCAA did not violate Plaintiffs' procedural due process rights. *See also District of Columbia*, 940 A.2d at 177 ("[W]e hold that while the plaintiffs' cause of action . . . 'is a species of property protected by . . . [d]ue process,' they received 'all the process that is due' when Congress barred pending actions such as theirs from proceeding as a rational means 'to give comprehensive effect to a new law that it considered salutary.' " (quoting *Logan*, 455 U.S. at 428, 102 S. Ct. 1148; *Landgraf*, 511 U.S. at 268, 114 S. Ct. 1483) (brackets omitted)).

In conclusion, like all other appellate courts to have addressed the issue, we hold that the PLCAA is constitutional.

4. *Constitutional Avoidance*

We respond briefly to the thoughtful views of our dissenting colleague on the topic of constitutional avoidance. That doctrine does not apply where, as here, congressional intent is clear from the text and purpose of the statute. *See supra* note 8 (quoting *Boumediene*, 128 S. Ct. at 2271). Because the dissent's alternative interpretation of the PLCAA rests entirely on the doctrine, we explain below why the doctrine would not apply, even if congressional intent were not clear from the text and purpose of the statute.

We begin with the scope of the doctrine. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Supreme Court stated that, "where an otherwise acceptable construction of a statute would raise *serious constitutional problems*, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.

Ed. 2d 645 (1988) (emphasis added); *see also Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) (describing the doctrine as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises *serious constitutional doubts*" (emphasis added)). As the Court has instructed, we may invoke the doctrine only if we have "grave doubts" about the constitutionality of the statute. *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L. Ed. 1061 (1916)); *see also id.* at 238, 118 S. Ct. 1219 ("[T]hose who invoke the doctrine must believe that the alternative is a *serious likelihood* that the statute will be held unconstitutional." (emphasis added)).

We have no grave doubts here. The dissent does not, and cannot, point to a single case in which we, the Supreme Court, or any sister circuit has held that a federal statute violates substantive due process for the reasons asserted by Plaintiffs. And, as discussed above, we have upheld against constitutional challenges many statutes with characteristics nearly identical to those of the PLCAA.

The dissent bypasses those important and indisputable facts in the following way. First, it argues that the Supreme Court has never addressed the *precise* issue at hand: whether Congress may abolish pending common-law claims [11] without providing any alternative means of redress. Second, the dissent argues that the Supreme

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[11] Plaintiffs bring statutory, not common-law claims; as we have recognized above, however, the relevant California statutes essentially codify state common law.

Court has suggested that this issue would raise serious constitutional questions. We disagree on both counts.

First, the PLCAA does not completely abolish Plaintiffs' ability to seek redress. The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule. Some claims are preempted, but many are not. Indeed, as we hold below, Plaintiffs may proceed on their claims against Defendant China North. Plaintiffs' ability to seek redress has been limited, but not abolished.[12]

Second, we do not doubt the constitutionality of the PLCAA, let alone have "grave doubts." As discussed above, no decision by us, the Supreme Court, or any sister circuit has held that a statute violates substantive due process for the reasons asserted by Plaintiffs. To the contrary, scores of cases concerning very similar statutes have held that the statutes do not violate substantive due process principles.

The dissent finds, in a small number of sources, hints that there could be a lurking, serious constitutional question. Justice Marshall stated in a concurrence that

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[12] Furthermore, as the dissent recognizes, dissent at 1162, its proffered interpretation of the PLCAA would raise the same constitutional concern. The dissent would require a plaintiff to allege and prove a "knowing" statutory violation, even though that requirement introduces a new, or more difficult, element for the plaintiff to prove. Dissent at 1163. That interpretation, however, also "abolishes" common-law remedies for a large class of plaintiffs, because certain claims that were cognizable before the enactment of the PLCAA would no longer be cognizable. Whatever the boundaries of the constitutional avoidance doctrine, its point is to adopt an alternative interpretation of the statute that avoids any constitutional problem, whereas the dissent's alternative still raises the identical issue in a slightly different form.

he would adopt a more searching review, *see PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (Marshall, J., concurring), and Justice White stated in a dissent from dismissal of certiorari that he would prefer to address the issue, *see Fein v. Permanente Med. Group*, 474 U.S. 892, 894-95, 106 S. Ct. 214, 88 L. Ed. 2d 215 (1985) (White, J., dissenting from dismissal of certiorari). Dissent at 1150-51. Those comments do not raise a serious constitutional question. The doctrine of constitutional avoidance requires "grave doubts," not occasional statements by a justice or two.

More importantly, the dissent quotes majority opinions in two cases: *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 201, 37 S. Ct. 247, 61 L. Ed. 667 (1917); and *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978). Dissent at 5597-98. But those sources do not demonstrate a serious constitutional question either. In *White*, the Court expressed concern about whether "a State might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside *all common-law rules* respecting liability as between employer and employee, without providing a reasonably just substitute." 243 U.S. at 201, 37 S. Ct. 247 (emphasis added). That dictum is inapposite. The PLCAA contains numerous exceptions and comes nowhere near setting aside all common-law rules concerning firearm manufacturers.

The dissent's reliance on *Duke Power* is even less persuasive. There, the Court reiterated that it was an open question whether a legislature may abolish a common-law recovery scheme without providing a reasonable substitute remedy. *Duke Power*, 438 U.S. at 88, 98 S. Ct.

2620. As we have repeatedly noted, here Congress has left in place a number of substitute remedies.

For these reasons, we decline to apply the doctrine of constitutional avoidance.

C. *Preemption of Claims Against Defendant China North*

Finally, we address Defendant China North's interlocutory appeal from the district court's order holding that the PLCAA does not preempt Plaintiffs' claims against it. We return to the text of the PLCAA, which preempts

> a civil action or proceeding or an administrative proceeding brought by any person *against a manufacturer or seller of a qualified product*, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [specified enumerated exceptions.]

15 U.S.C. § 7903(5)(A) (emphasis added). Again, we agree with the parties that this case is a "civil action" brought by a "person" for damages and other relief to redress harm, "resulting from the criminal . . . misuse of a qualified product by . . . a third party." *Id.* The parties dispute, however, whether the case is "brought . . . against a manufacturer or seller of a qualified product." *Id.*

In *Ileto I*, 349 F.3d at 1215, we held that Plaintiffs' claims against Defendant China North stated a claim under California law because of China North's status as a manufacturer and seller of firearms. The PLCAA preempts only actions brought against *federally licensed* manufacturers and sellers of firearms. *See id.* § 7903(2)

(defining the term "manufacturer"); *id.* § 7903(6) (defining the term "seller").[13] China North concedes that it is not a federally licensed manufacturer or seller of firearms. It follows, then, that the PLCAA does not preempt Plaintiffs' claims against China North.

To escape this straightforward reasoning, China North points out that the PLCAA preempts more than actions brought against federally licensed manufacturers and sellers of firearms. The PLCAA also preempts actions brought against *all* sellers of ammunition. *Id.* § 7903(6)(C). China North argues that, because it is a seller of ammunition, the PLCAA preempts Plaintiffs' claims, notwithstanding the fact that Plaintiffs' claims concern only China North's actions as a manufacturer and seller of firearms and have nothing to do with China North's coincidental status as a seller of ammunition. We are unpersuaded.

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[13] The full text of those provisions states:

> The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under [federal law].

15 U.S.C. § 7903(2).

> The term "seller" means, with respect to a qualified product—
>
> (A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under [federal law];
>
> (B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under [federal law]; or
>
> (C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

Id. § 7903(6).

The PLCAA preempts specified types of liability actions; it does not provide a blanket protection to specified types of defendants. *See id.* § 7902(a) ("A qualified civil liability action may not be brought in any Federal or State court."). Furthermore, Congress chose to preempt certain actions brought against manufacturers and sellers of firearms, but explicitly limited the preemptive effect to those manufacturers and sellers who are *federally licensed*. China North's reading of the statute would eviscerate that limitation when, as here, the defendant also happens to be a seller of ammunition.

China North argues that, had Congress intended a nexus between the basis of the allegations and the nature of the defendant's business, it would have modified the term "qualified product" with the definite article "the," instead of the indefinite article "a." The scope of pre-empted actions thereby would encompass

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of [**the**] qualified product by the person or a third party.

15 U.S.C. § 7903(5)(A). We grant that China North's alteration arguably is more clear but, without more, we are not persuaded on that basis alone that Congress intended to undo the logical reading of the statute as requiring a nexus between the basis of the allegations and the nature of the defendant's business. Plaintiffs' claims concern the manufacture and sale of firearms; we cannot conclude that those claims are pre-empted simply because China North also happens to sell ammunition.

We therefore affirm the district court's holding that the PLCAA does not preempt Plaintiffs' claims against China North, and we remand for further proceedings.

CONCLUSION

We sympathize with Plaintiffs, who suffered grievous harm, that Congress preempted some of their claims. Nevertheless, the Constitution "allocates to Congress responsibility for [such] fundamental policy judgments." *Landgraf*, 511 U.S. at 273, 114 S. Ct. 1483. Finding no constitutional flaw, we affirm the district court's holding that the PLCAA applies to Plaintiffs' claims against Defendants Glock and RSR. We also affirm the district court's holding that the PLCAA does not apply to Plaintiffs' claims against Defendant China North because, lacking a federal firearms license, it cannot seek haven under the PLCAA.

No. 06-56872: AFFIRMED. Costs on appeal awarded to Defendants-Appellees Glock and RSR.

Nos. 07-15403 & 07-15404: AFFIRMED and REMANDED for further proceedings. Costs on appeal awarded to Plaintiffs-Appellants.

BERZON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the language of the PLCAA's predicate exception is ambiguous. The interpretation on which the majority ultimately settles, however, requires deciding what I consider to be a substantial constitutional question: whether, if the PLCAA requires the dismissal of Plaintiffs' pending state causes of action, the statute will unconstitutionally deprive them of a protected property interest.

The majority resolves this question by concluding that the PLCAA's mandatory dismissal provision is rationally

related to a legitimate government interest and that no heightened level of constitutional scrutiny is warranted. The majority's cursory discussion of the constitutional issue belies the sweeping nature of what it reads the PLCAA to do, and the difficult questions of constitutional law required to uphold that reading. Neither the Supreme Court nor this Circuit has ever made clear that rational basis review is the proper standard on which to review a federal statute that retroactively requires the dismissal of pending causes of action for injuries cognizable at common law but does not leave any alternative means of redress. Moreover, even if we were to assume that no heightened level of scrutiny is appropriate, I am not convinced that such a statute would survive the rational basis review outlined by the Supreme Court in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978).

The majority tacitly breaks new ground in deciding these questions. It need not—and should not—do so. The canon of constitutional avoidance counsels that we should "construe the statute to avoid [serious constitutional questions] unless such a construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988); *see also Clark v. Martinez*, 543 U.S. 371, 380-81, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979). In accordance with that maxim, I would adopt a different, but in my view equally supportable, reading of the ambiguous statutory language, which would permit the Plaintiffs' suit as against Defendants Glock and RSR ("Defendants") to go forward. I therefore respectfully dissent from the

majority's discussion of Plaintiffs' substantive due process challenge, as I would not decide the question, and from its holding that their lawsuit does not come within the PLCAA's predicate exception.

I.

A.

Plaintiffs have raised a number of constitutional challenges. The one that concerns me here is their substantive due process argument. Before I explain why their challenge presents a serious constitutional question, I think it useful, as a preliminary matter, to identify the property interest on which Plaintiffs contend the PLCAA intrudes. *See Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994).

Generally speaking, if a plaintiff alleges that a fundamental right is burdened by a state action, the state action is subject to strict scrutiny and cannot stand unless it is "narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (internal quotation marks omitted). If a lesser liberty or property interest is at stake, the state action is subject to rational basis review, which requires "a reasonable relation to a legitimate state interest." *Id.* at 722, 117 S. Ct. 2258. Various forms of intermediate scrutiny, in between these two poles, have sometimes been found applicable. *See Hutchins v. District of Columbia*, 188 F.3d 531, 563 & n. 24 (D.C. Cir. 1999) (Rogers, J., concurring in part) (collecting cases).

Plaintiffs here have asserted a property interest in maintaining their pending state-law causes of action. They acknowledge that the monetary award those causes of action might ultimately yield if they proceeded to a final judgment is uncertain, so they currently have no en-

forceable right to any particular amount of damages. But, they assert, the PLCAA also trenches on a separate and independently valuable interest: their interest in maintaining their causes of action prior to judgment and not having them dismissed.

The majority implicitly agrees with Plaintiffs' position that this interest is cognizable and protected by the Due Process Clause. This much is clear, because the majority applies rational basis review. If Plaintiffs' interest were wholly unprotected, no scrutiny, rational basis or otherwise, would be required.

I pause to emphasize this point, because the majority then goes on to make a potentially misleading statement: that Plaintiffs have no "vested property right in their accrued state-law causes of action." Maj. Op. at 1141. What the majority appears to mean is that Plaintiffs have not stated a fundamental property interest deserving of heightened scrutiny. I do not understand the majority to mean that Plaintiffs have no property interest in their causes of action at all. If that were what the majority meant, it would be quite wrong. Like stocks or business operating licenses, the probable value of a plaintiff's cause of action may fluctuate over time—here, between filing and the entry of judgment—but such fluctuations do not mean that the cause of action is without value.[1] Plaintiffs have expended time and money

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[1] Stock ownership creates a property interest, even though the value of stock is uncertain until the moment it is sold. *See Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 197 F.2d 994, 1008 (9th Cir. 1952), *rev'd on other grounds*, 345 U.S. 247, 73 S. Ct. 656, 97 L.Ed. 986 (1953). Similarly, a state operating license (such as a liquor license) that has been granted and can be revoked only "for cause" creates a cognizable property interest, even though the ultimate worth of that license, in terms of how much of a profit the licensee will earn in a year by operating under it, is uncertain. *See Barry v.*

to maintain their lawsuit, and, if they were so inclined, they could have "sold" their causes of action to defendants by settling for a sum of money reflecting the expected recovery at that point in the litigation.[2] A pending cause of action, therefore, may be more or less valuable at various points during its pendency, but, even before it is reduced to a final dollar amount, it is a "species of property protected by the ... Due Process Clause," as the Supreme Court held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (citations omitted).

I therefore read the majority's statement that Plaintiffs lack a "vested property right in their accrued state-law causes of action," Maj. Op. at 1141, to indicate the majority's view that although there is a protected property interest at stake, it is not a fundamental right, so rational basis review, rather than strict scrutiny, is sufficient. This usage, though odd, appears to be consistent with our case law. *Lyon v. Agusta S.P.A.*, 252 F.3d 1078

Barchi, 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979). And pending causes of action qualify as "property of the estate" in bankruptcy under 11 U.S.C. § 541(a)(1)—including causes of action sounding in tort, such as personal injury, for which the ultimate amount of recovery is uncertain. *See, e.g., In re Arnold*, 252 B.R. 778 (9th Cir. BAP 2000); *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707-09 (9th Cir. 1986).

[2] Additionally, California law designates certain civil actions as "choses in action," which may be assigned to third parties while they are still pending. *See* Cal. Civ. Code Sec. 954 (tort actions for damage to personal property are assignable). Although apparently not applicable to Plaintiffs' causes of action in this case, *see Pony v. County of Los Angeles*, 433 F.3d 1138, 1143 (9th Cir. 2006) (tort actions for personal injury are typically not assignable under California law), the "chose in action" concept further underscores the fact that pending causes of action generally have value prior to judgment.

(9th Cir. 2001), for example, stated that "a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained," *id.* at 1086 (internal quotation marks and emphasis omitted), but it also assumed that a statute depriving the party of the ability to litigate that cause of action must nevertheless withstand rational basis review. *See id.* ("Of course, the legislature must act in a rational manner; that almost goes without saying. Here the choice was assuredly rational.") (internal citations omitted). *Accord Duke Power*, 438 U.S. at 88 n. 32, 98 S. Ct. 2620 (stating that "[a] person has no property, no vested interest, in any rule of the common law," but applying rational basis review to federal statute precluding suit) (internal quotation marks and citation omitted); *Fields v. Legacy Health Sys.*, 413 F.3d 943, 955-56 (9th Cir. 2005) (upholding statute against substantive due process challenge on rational basis review; recognizing a distinction between vested and non-vested property rights only in the context of petitioner's procedural due process claim).[3]

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[3] The majority also cites *Austin v. City of Bisbee*, 855 F.2d 1429 (9th Cir. 1988), as supporting its constitutional holding. *Austin* is confusing. It states first that "[a] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," *id.* at 1435 (internal quotation marks omitted), then that a pending cause of action is "inchoate and affords no definite or enforceable property right until reduced to final judgment," *id.* at 1436 (citation omitted), and finally that "[e]ven if Austin had a cognizable property right to overtime compensation, his claim fails on due process grounds." *Id.* If the middle one of these statements is read as indicating that even rational basis scrutiny is inapplicable, it would be clearly at odds with *Duke Power*, which identifies rational basis as the appropriate level of review for such a deprivation. It would also be inconsistent with the very case *Austin* cites as support: *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 988-89 (9th Cir. 1987), which adopted the First Circuit's analysis in

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If this case were directly controlled by the case law just cited, I would agree that rational basis review is the proper level of scrutiny to apply here. And if the PLCAA were indistinguishable from the statutes at issue in *Lyon*, *Duke Power*, *Fields* and *Austin*, I would be constrained to hold that the PLCAA's intrusion on Plaintiffs' interest survives rational basis review.

But the PLCAA is unlike those other statutes in critical respects. We have never upheld against substantive due process attack a federal statute with precisely the PLCAA's constellation of characteristics: (1) It completely extinguishes an individual litigant's ability to litigate a cause of action, rather than limiting the amount of recovery or the procedure for bringing suit, and it leaves no alternative channel by which the individual may address his injury; and (2) the individual's cause of action is for an injury that would be cognizable under state common law, and it was filed and pending at the time of the federal statute's enactment.[4] To hold such a statute constitu-

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Hammond v. United States, 786 F.2d 8 (1st Cir. 1986). Both *Atmospheric Testing* and *Hammond*, despite their observation that one has no "vested" interest in a pending cause of action, apply rational basis review to the deprivation of that interest. *See Atmospheric Testing*, 820 F.2d at 990; *Hammond*, 786 F.2d at 12-13. (The First Circuit recently clarified that *Hammond* does not stand for the proposition that a litigant has *no* protected interest in a cause of action prior to the entry of judgment; if it did, it would be "squarely in tension with the Supreme Court's recognition in *Logan* that a cause of action is a protected property interest." *See Dr. Jose S. Belaval, Inc. v. Perez-Perdomo*, 465 F.3d 33, 37 n. 4 (1st Cir. 2006).) I therefore do not read the opaque line in *Austin* as anything other than a factual statement about the nature of a pending cause of action.

[4] All the cases on which the majority relies are distinguishable on one or more of these grounds.

Lyon involved a challenge to the General Aviation Revitalization Act's statute of repose, which barred any "civil action" against a manufacturer if the accident occurred more than eighteen years after the aircraft was delivered to the purchaser. *See* 252 F.3d at 1081. The statute did not completely extinguish litigants' rights to sue in tort, but only limited the window in which such causes of action could be filed. The *Lyon* plaintiffs had not yet filed an action at the time of the statute's passage. *See id.*

Austin involved a challenge to an amendment of the Fair Labor Standards Act that barred recovery of unpaid overtime wages accrued prior to 1986. *See* 855 F.2d at 1431. The amendment did not abrogate state tort law; rather, it curtailed a statutorily-created cause of action. *See id.* at 1436 ("Property rights to public benefits are defined by the statutes or customs that create the benefits. When, as here, the statute authorizing the benefits is amended or repealed, the property right disappears.") (internal quotation marks omitted).

Fields involved a challenge to Oregon's statute of limitations for wrongful death suits and its statute of repose for medical malpractice suits. The state provisions did not extinguish individuals' ability to sue entirely, but only narrowed the temporal window in which suits could be filed. *See* 413 F.3d at 956-57. Moreover, *Fields* noted that the plaintiffs' "right of action for wrongful death is purely statutory and . . . in Oregon there was no right of action for wrongful death at common law." *Id.* at 959. In addition, Oregon's statutes of limitation and repose were enacted long before Fields filed his suit. *See id.* at 949; *see also* Or. Rev. Stat. §§ 30.020(1) (statute of limitations), 12.110(4) (statute of repose).

Duke Power involved a challenge to the Price-Anderson Act, which limited federally licensed nuclear facilities' accident liability to $560 million. *See* 438 U.S. at 66-67, 98 S. Ct. 2620. The Act did not abrogate state tort remedies, but only imposed a federal limit on the maximum amount of recovery plaintiffs could obtain. The Act also provided for cost-sharing among nuclear operators and the mandatory waiver of defenses in case of an accident, *id.* which the Court held was a "reasonably just substitute for the [status quo at] common-law[.]" *Id.* at 88, 98 S. Ct. 2620. The plaintiffs, who lived close to planned nuclear facilities, had not filed any cause of action at the time of the Price-Anderson Act's passage; rather, they sought a declaratory judgment that the Act was unconstitutional, premised on

tional on rational basis review, despite the absence of any provision for alternative forms of redress, is to step onto new and uncertain constitutional territory.

In general, the majority is correct that Congress may limit or abrogate rights recognized at common law when enacting legislation "adjusting the burdens and benefits of economic life," so long as the abrogation is rationally related to a permissible goal. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). It is not clear from past case law, however, whether rational basis review is the appropriate level of scrutiny for a statute that abrogates common-law remedies *without providing or leaving open a substitute remedial scheme.*

In fact, the Supreme Court as a whole and individual Justices of the Court have repeatedly recognized that "[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (Marshall, J, concurring). *See also New York Central R.R. Co. v. White*, 243 U.S. 188, 201, 37 S. Ct. 247, 61 L. Ed. 667 (1917) (expressing uncertainty as to whether "a state might, without violence to the constitutional guaranty of due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute"). To date, the Supreme Court has never decided what level of constitutional scrutiny applies to a statute that abrogates a common-law cause of action and leaves no alternative

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the prospective due process violation they would suffer should a nuclear accident occur. *Id.* at 67-70, 98 S. Ct. 2620.

remedy available. Dissenting from the dismissal of certiorari in a case that would have presented this question squarely, Justice White noted:

> Whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, . . . appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States.

Fein v. Permanente Med. Group, 474 U.S. 892, 894-95, 106 S. Ct. 214, 88 L. Ed. 2d 215 (1985) (White, J., dissenting from dismissal of certiorari). This same question was expressly left unresolved in *Duke Power*, which declined to decide what constitutional test would apply to a statute that left no alternative remedies available:

> Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

438 U.S. at 88, 98 S. Ct. 2620 (footnote omitted).

Following *Duke Power*'s lead, when this Circuit confronted a substantive due process challenge to a portion of the Atomic Energy Act abolishing individuals' ability to sue certain government contractors for injuries recognized at state common law in *Atmospheric Testing*, it upheld the Act on rational basis review only in conjunction with the observation that substitute remedies—both the Federal Tort Claims Act and veterans benefits legis-

lation—were available to compensate the would-be plaintiffs for the unavailability of personal injury and wrongful death suits. *See Atmospheric Testing*, 820 F.2d at 990-91.[5] Other courts of appeal have done the same. *See, e.g.*, *Hammond*, 786 F.2d at 14 (noting that, in addition to the Federal Tort Claims Act's administrative scheme, "there may be government compensation available to many of those injured by radiation, including the plaintiff here, under veterans benefits legislation, . . . or the [Federal Employees Compensation Act]."); *Ducharme v. Merrill-Nat'l Labs.*, 574 F.2d 1307, 1309 (5th Cir. 1978) (upholding the Swine Flu Act's prohibition on tort suits against private manufacturers of swine flu vaccine, but also noting that "[t]he [substitute] cause of action provided by the Swine Flu Act to an injured person against the United States is substantially the same as that afforded . . . under [Louisiana law] except that under the Swine Flu Act no trial by jury is afforded and the plaintiff is required to seek first administrative review of his claim.")

Just as the federal courts are reluctant to construe a statute as abolishing common-law rules without providing *some* alternative method of redress, so Congress is reluctant to pass legislation immunizing a private industry from common-law tort liability—for example, when that industry is acting in concert with a govern-

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[5] *Kyle Rys., Inc. v. Pacific Admin. Servs., Inc.*, 990 F.2d 513 (9th Cir. 1993), is not to the contrary. The plaintiff in *Kyle* had not filed a state claim for unjust enrichment at the time of ERISA's passage, so the property interest he was asserting was an interest in bringing a lawsuit, not in maintaining a pending one. *Kyle*, 990 F.2d at 518-19. Additionally, although ERISA did not furnish Kyle with a replacement federal cause of action, *id.* at 519, it does provide certain "quid pro quos" to individuals covered by employee benefit plans. The PLCAA, in contrast, provides nothing *but* a "gap in the law." *Id.*

mental program or playing a vital role in the nation's economy or defense—without preserving state tort law as a parallel track or providing some alternative mechanism to compensate injured parties.[6] Similarly, the Supreme Court has sometimes declined to read federal statutes as extinguishing the availability of state tort causes of action in preemption cases—even where no due process argument was advanced by the parties—when the statute lacks a clear statement that Congress intended to do so. *See, e.g., Wyeth v. Levine*, --- U.S. ----, 129 S. Ct. 1187, 1200, 173 L. Ed. 2d 51 (2009); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002).

The statute at issue here is different. As interpreted by the majority, the PLCAA retroactively extinguishes Plaintiffs' pending state tort causes of action, *and* it leaves them without *any* remedy for the injuries they claim they have suffered due to Defendants' unlawful acts. No controlling case law establishes that such legis-

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[6] Consider, for example, the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 *et seq.*, which provides a no-fault compensation scheme as an alternative to tort law, *see Schafer v. American Cyanamid Co.*, 20 F.3d 1, 1-2 (1st Cir. 1994); and the Air Transportation Safety and System Stabilization Act, 49 U.S.C. §§ 40101 *et seq.*, which creates a compensation fund and provides "an exclusive federal cause of action for . . . claims [arising out of the September 11, 2001, airplane crashes] to be brought in the Southern District of New York, and adjudicated on the basis of applicable state law." *Benzman v. Whitman*, 523 F.3d 119, 126 (2d Cir. 2008) (internal citations omitted). *But see* FISA Amendments Act of 2008, § 802, 122 Stat. 2436, Pub.L. No. 110-261 (July 10, 2008) (providing that a "civil action . . . in a Federal or State court" arising out of an individual or telephone company's cooperation with the government's counter-terrorism wiretap program "shall be promptly dismissed" upon the Attorney General's certification). No federal court has yet considered whether the FISA Amendments Act violates due process.

lation survives constitutional scrutiny. Rather, the cases canvassed above suggest that at least a modified form of rational basis review, and perhaps a more searching type of review, may be warranted for such a statute.

More specifically, if one applied to a statute abolishing pending common-law causes of action and providing no alternative remedy a test no more searching than the rational basis review applied to the Price-Anderson Act in *Duke Power*, it is possible that such a statute would be held to violate due process. *Duke Power* inquired whether "the legislature has acted in an arbitrary and irrational way," 438 U.S. at 84, 98 S. Ct. 2620 (quoting *Usery*, 428 U.S. at 15, 96 S. Ct. 2882), but, as part of its "arbitrary and irrational" inquiry, engaged in a lengthy examination of the Price-Anderson Act, taking into consideration among other things that the Act provided a compensation scheme that was a "reasonably just substitute" to the common law, *id.* at 88, 98 S. Ct. 2620, and perhaps even an improvement on the common law.[7] In other words, the availability and effectiveness of alternative remedies was a factor in determining whether Congress had acted rationally or not. Thus, *Duke Power* applied a modified

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[7] *See id.* at 90-92, 98 S. Ct. 2620 ("We view the congressional assurance of a $560 million fund for recovery, accompanied by an express statutory commitment[ ] to take whatever action is deemed necessary and appropriate to protect the public from the consequences of a nuclear accident, to be a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage. . . . Nor are we persuaded that the mandatory waiver of defenses required by the Act is of no benefit to potential claimants. . . . All of these considerations belie the suggestion that the Act leaves the potential victims of a nuclear disaster in a more disadvantageous position than they would be in if left to their common-law remedies—not known in modern times for either their speed or economy.") (internal citations omitted).

rational basis test, not unlike the due process test applied in cases involving retroactive legislation. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984) (economic legislation that Congress plainly intends to have retroactive effect must not only be rationally related to a legitimate state interest as a general matter, but there must also be a rational basis for its retroactive application). *Duke Power* suggests that, at a minimum, a modified rational basis test would apply here, rendering the PLCAA constitutional only if there were rational bases both for Congress's failure to supply any alternative remedies and for its decision to apply the dismissal provision retroactively to extinguish the remedies for common-law injuries that had already occurred and were the subject of pending litigation.[8]

Alternatively, *Duke Power* leaves open the possibility that where the challenged statute leaves no alternative remedy available, the statute should be subject not to rational basis review but to a heightened form of scrutiny. *See Duke Power*, 438 U.S. at 88, 98 S. Ct. 2620. Concurring in *PruneYard*, which upheld a California state constitutional limitation on the availability of private trespass claims against peaceful leafletters, Justice

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[8] Of course, as rational basis review does not require that legislation be the least restrictive means of achieving Congress's ends, the alternative remedy would not need to be an equally good substitute for the tort remedy it displaced. *See Atmospheric Testing*, 820 F.2d at 991 (acknowledging that "Congress could have . . . [achieved its goal of protecting independent government contractors from suit] and still provided those injured by radiation a more generous substitute compensation scheme," but concluding that "we cannot say that Congress'[s] choice of means was without any rational basis.") (internal quotation marks omitted).

Marshall agreed that states may alter the protection of the common law to a point, but he emphasized:

> I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a *compelling showing of necessity* or a provision for a *reasonable alternative remedy*.

PruneYard, 447 U.S. at 93, 100 S. Ct. 2035 (Marshall, J., concurring) (footnote omitted; emphases added). In other words, even though no one has a protected property interest in any particular rule of the common law "entitling him to insist that it shall remain unchanged for his benefit," *White*, 243 U.S. at 198, 37 S. Ct. 247, an individual does have a weighty property interest in having *some* legal means available to redress an injury that would have been compensable at common law. Justice Marshall's concurrence in *PruneYard* suggests this interest may be so weighty as to require not merely a rational relation to a legitimate governmental interest, but a "compelling showing of necessity"—a heightened

form of scrutiny. *PruneYard*, 447 U.S. at 93, 100 S. Ct. 2035 (Marshall, J., concurring).

C.

I will not venture further into this unsettled constitutional territory. For purposes of the avoidance canon, it is sufficient to determine that a serious constitutional question exists, and the case law I have just canvassed demonstrates that this is so. *Clark*, 543 U.S. at 381, 125 S. Ct. 716. The majority disagrees, noting that "[t]he dissent does not, and cannot, point to a single case in which we, the Supreme Court, or any sister circuit has held that a federal statute violates substantive due process for the reasons asserted by Plaintiffs." Maj. Op. at 1143. But that is precisely the point of the constitutional avoidance canon—to avoid open questions. As I have explained, the Supreme Court in *Duke Power* expressly left open the question whether "the Due Process Clause ... requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Duke Power*, 438 U.S. at 88, 98 S. Ct. 2620. *See also PruneYard*, 447 U.S. at 93, 100 S. Ct. 2035 (Marshall, J., concurring) (noting that the question whether Congress can constitutionally "abolish certain categories of common-law rights in some general way ... without a compelling showing of necessity or a provision for a reasonable alternative remedy" is unresolved). Nor has this Court ever *upheld* against constitutional challenge a statute with the same sweepingly preclusive effect on state tort remedies as the majority reads the PLCAA to have.[9] Precisely *because*

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[9] The majority asserts that "scores of cases concerning very similar statutes have held that the statutes do not violate substantive due process principles," Maj. Op. at 1144, but it cites to none. As I have shown above, *supra* note 4, each of the cases on which the majority

we have no precedent to follow in resolving Plaintiffs' substantive due process challenge, we should not do so if we can avoid it.

I therefore cannot join the majority in rejecting on the merits Plaintiffs' substantive due process challenge. The applicable case law does not compel the majority's conclusions that, applying rational basis review, the PLCAA survives review. Nor does it foreclose the possibility that a focused form of rational basis review, taking special account of the retroactivity feature and the lack of any alternative means of redress, or, even, heightened scrutiny applies. Reading the PLCAA to extinguish Plaintiffs' claims without providing any alternative scheme for compensation thus raises serious constitutional questions that neither we nor the Supreme Court have resolved. I do not know how I would resolve these questions if they were unavoidably before me, but I am certain that they are more serious and complex than the majority's brief treatment suggests.

II.

Given my view of the constitutional issue in this case, I am constrained to apply the venerable maxim of statutory interpretation prescribing that where ambiguous statutory language is capable of bearing two or more interpretations, courts should adopt the interpretation that does not raise a serious constitutional question "unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575, 108 S. Ct. 1392. *See also INS v. St. Cyr*, 533 U.S. 289, 299-300, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) ("[I]f an otherwise accep-

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relies in rejecting Plaintiffs' substantive due process argument involves a statute that is distinguishable from the PLCAA in some significant respect.

table construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932)).

As I explain below, there is such an alternative interpretation of the PLCAA's predicate exception: one that would avoid raising the substantive due process question altogether, by construing Plaintiffs' state-law causes of action as arising under "statute[s] . . . applicable to the sale and manufacture" of firearms. 15 U.S.C. § 7903(5)(A)(iii). This alternative interpretation is not only "fairly possible" in light of the statute's text and legislative history, *see St. Cyr*, 533 U.S. at 300, 121 S. Ct. 2271 (internal citation and quotation marks omitted), but also preferable to the majority's reading raising the constitutional questions just outlined.

A.

The PLCAA's predicate exception creates a carve-out from the PLCAA's mandatory dismissal provision for "action[s] in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii).

The ambiguity in this provision derives primarily from its use of the word "applicable." As the majority notes, the phrase "applicable to X" can mean, broadly, "capable of being applied to X," or, narrowly, "specifically or even exclusively relevant to X." Construing other statutes and enactments, courts have read the word "applicable" more broadly or more narrowly, depending upon contextual clues. *See, e.g., Fong v. Glover*, 197 F.2d 710, 711 (9th

Cir. 1952); *McGee v. Peake*, 511 F.3d 1352 (Fed. Cir. 2008); *Snyder v. Buck*, 75 F. Supp. 902, 907 (D.D.C. 1948), *vacated on other grounds*, 179 F.2d 466 (D.C. Cir. 1949). Like the majority, I think case law construing what Congress meant when it used the word "applicable" in other statutes unrelated to the PLCAA does little to illuminate the word's meaning here. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522-24, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994). What is clear, at least, is that the predicate exception cannot possibly encompass *every* statute that might be "capable of being applied" to the sale or manufacture of firearms; if it did, the exception would swallow the rule, and no civil lawsuits would ever be subject to dismissal under the PLCAA. I therefore agree with the majority that a limiting principle must be found, and that rather than trying to locate it in the word "applicable" itself, we must look to the predicate exception's surrounding words.

In my view, the key to interpreting the predicate exception is Congress's use of the word "knowingly." 15 U.S.C. § 7903(5)(A)(iii). Generally speaking, a "knowing" violation of a given law requires "proof of [the defendant's] knowledge of the facts that constitute the offense." *Bryan v. United States*, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998); *see also* Cal. Penal Code § 7, para. 5 (stating that for purposes of the California Penal Code, "[t]he word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission."). Knowing conduct thus stands in contrast to negligent conduct, which typically requires only that the defendant knew or *should have known* each of the facts

that made his act or omission unlawful and/ or the harm that was likely to occur.[10]

Neither of the California statutes on which Plaintiffs' suit is based requires actual knowledge as a prerequisite for liability. The negligence statute, Cal. Civ. Code § 1714(a), requires as part of the proximate cause analysis that the harm caused by a defendant's act or omission be "reasonably foreseeable." *Lugtu v. Cal. Highway Patrol*, 26 Cal.4th 703, 716, 110 Cal. Rptr. 2d 528, 28 P.3d 249 (2001). A private nuisance under the nuisance statute, Cal. Civ. Code §§ 3479-80, generally requires a showing that the defendant's act caused an "unreasonable invasion of [the plaintiff]'s interest in the free use and enjoyment of [hi]s property." *Hellman v. La Cumbre Golf & Country Club*, 6 Cal. App. 4th 1224, 1230, 8 Cal. Rptr. 2d 293 (1992). This "unreasonableness" factor plays a similar role to the "foreseeability" factor in the negligence context, and California courts have recognized that an action for nuisance will often require functionally the same showing as an action for negligence. *See El Escorial Owners' Ass'n v. DLC Plastering, Inc.*, 154 Cal. App. 4th 1337, 1349, 65 Cal. Rptr. 3d 524 (2007); *Pamela W. v. Millsom*, 25 Cal.App.4th 950, 954 n. 1, 30 Cal. Rptr. 2d 690 (1994); *Lussier v. San Lorenzo Valley Water Dist.*, 206 Cal. App. 3d 92, 103-04, 253 Cal. Rptr. 470 (1988).

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[10] *See* RESTATEMENT (THIRD) OF TORTS § 3, cmt. g ("To establish the actor's negligence, it is not enough that there be a likelihood of harm; the likelihood must be foreseeable to the actor at the time of conduct. Foreseeability often relates to practical considerations concerning the actor's ability to anticipate future events or to understand dangerous conditions that already exist. In such cases, what is foreseeable concerns what the actor 'should have known.'").

That neither Cal. Civ. Code § 1714 nor Cal. Civ. Code §§ 3479-80 requires knowing conduct is not the end of the inquiry. The PLCAA's predicate exception does not limit its application to suits for "violations of State or Federal statutes that require knowing conduct"; rather, it applies to suits for "knowing[ ] violation[s][of] . . . State or Federal statute[s]." 15 U.S.C. § 7903(5)(A)(iii). The difference is material: The PLCAA's actual knowledge requirement can quite reasonably be read to create a mental-state overlay, a heightened requirement that a plaintiff must meet if his lawsuit is to proceed under the new PLCAA regime, regardless of whether the underlying statute requires such a mens rea.[11]

Plaintiffs here allege that Defendants knowingly committed a range of acts in violation of California negligence and nuisance law. Specifically, they allege that "Defendants . . . *knowingly* participate in and facilitate the secondary market where persons who are illegal pur-

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[11] I note, in addition, that Congress's use of the word "violation" does not necessarily suggest a distinction between common-law-based duties and legislatively-imposed duties. *Cf. Riegel v. Medtronic, Inc.*, — U.S. —, 128 S. Ct. 999, 1008, 169 L. Ed. 2d 892 (2008) ("Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments. Absent other indication, reference to a State's [']requirements[']' includes its common-law duties. . . . [C]ommon-law liability is premised on the existence of a legal duty, and a tort judgment therefore establishes that the defendant has *violated a state-law obligation*.") (emphasis added); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486, 495, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (plurality opinion) (holding that § 360k of the Medical Device Amendments, which preempts "any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device," does not "den[y] Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements.") (emphasis added).

chasers[, including Furrow,] ... obtain their firearms," First Amended Complaint ("FAC") ¶ 31 (emphasis added), and that "Defendant[s] ... select and develop distribution channels that they *know* regularly provide guns to criminals and underage end users ... [and, despite information from government crime trace reports,] *knowingly* supply a range of disreputable distributors, dealers, gun shops, pawnshops, gun shows, and telemarketers in the State of California...." *Id.* ¶ 32 (emphases added).[12] Plaintiffs also allege that Defendants intentionally flood police departments with frequent waves of upgrades, enabling Defendants to resell police departments' retired models on the secondary market. And Plaintiffs allege that "Defendants have full *knowledge* that their policies and practices will and regularly do result in substantially increased levels of firearms use in crime ... in California, and that their conduct ... [unreasonably] interferes with the public safety, health or peace ...." *Id.* ¶ 126-29 (emphasis added).

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[12] Further, Plaintiffs' complaint alleges that "the easy availability of firearms for criminal purposes is a direct, *known* result of [D]efendants' marketing and distribution policies and practices." FAC ¶ 58 (emphasis added). Although the Bureau of Alcohol, Tobacco and Firearms has "reported ... that ... about 1% [of dealers nationwide] account for over half of the successfully traced guns used in crime," *id.* ¶ 49, and although ATF regularly forwards Defendants crime-trace data on particular distributors and dealers, Defendants "choose not to use the data ... to change their marketing and distribution practices to reduce the foreseeable risk that their firearms will become possessed by prohibited persons." Id. ¶ 66 (emphasis added). Further, Plaintiffs allege, Defendant manufacturers choose not to train their dealers, *id.* ¶ 77, or to cut off contracts with distributors who sell to dealers with disproportionately high sale-to-crime rates. *Id.* ¶ 72. Defendants also allegedly market their products to appeal to prospective purchasers with criminal intent, emphasizing characteristics such as easy concealability and rapid fire capability. *Id.* ¶ 81-88.

With their allegations, Plaintiffs are not imputing vicarious liability to Defendants for Furrow's unlawful acts. Rather, they are alleging that Defendants themselves knowingly engaged in unlawful conduct: dangerous distribution and marketing practices, and the knowing maintenance of a nuisance. And while the majority is correct that Furrow's shooting was the last link in the causal chain that occasioned Plaintiffs' suit, *see* Maj. Op. at 1130 n.1, the violations of law for which Plaintiffs seek redress as against Defendants Glock and RSR are separate from the violations of law that Furrow himself committed. In other words, Plaintiffs advance a theory of direct liability, not vicarious liability, against Defendants. Their cause of action is premised on the allegation that Defendants' own wrongful conduct proximately caused them harm.[13]

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[13] In this respect, the case law concerning suits against municipalities under 42 U.S.C. § 1983 may provide a useful analogy, as it throws the distinction between direct liability and respondeat superior—a type of vicarious liability—into sharper relief. Under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.* at 691, 98 S. Ct. 2018. But, *Monell* held, a municipality can be held *directly* liable for a violation of the Constitution or a federal law under § 1983 if its own "policy or custom . . . inflicts the injury[.]" *Id.* at 694, 98 S. Ct. 2018. Later cases have clarified that a municipality will be liable for a policy of inadequate training or supervision of police officers only if the policy "reflects a 'deliberate' or 'conscious' choice by a municipality" not to avoid the risk of harm. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

Suppose, for example, that a municipality maintains a policy of hiring police officers without running criminal background checks on them or providing firearms training, and that it knows several of its officers have committed violent crimes in the course of duty in the past. If a police officer hired and retained under this policy then

One could quarrel with Plaintiffs' theory of causation, to be sure, and perhaps they would lose on summary judgment or at trial. But this Court determined on a prior appeal that Plaintiffs have properly stated violations of California law (including satisfying the statutes' requirement of proximate cause) for purposes of surviving a motion to dismiss, *see Ileto v. Glock*, 349 F.3d 1191, 1194 (9th Cir. 2003), and that holding is the law of the case. Maj. Op. at 1132 & n.2. The question now before us is whether, assuming that Plaintiffs have stated violations of California law, they have also alleged sufficient facts to come within the PLCAA's predicate exception and avoid its mandatory dismissal requirement.

At the time Plaintiffs' complaint was originally filed, the PLCAA had not yet been enacted. So, by alleging that Defendants had actual knowledge of the impact of their intentional actions rather than that the impact was reasonably foreseeable, Plaintiffs put forward more than they needed to state a claim under the California statutes.[14] When Congress passed the PLCAA in 2005,

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shoots and kills a group of innocent bystanders, the municipality would not be liable to the victims for the *shooting* on a respondeat superior theory, but it would be directly liable for its own wrongful act: maintaining a policy of inadequate screening and supervision with "deliberate indifference" to the risk of harm that policy created. *See Bd. of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). The violations are distinct, even though the same act—the shooting—occasions the victim's suit.

[14] I note, in this respect, that California courts do recognize "an aggravated form of negligence," sometimes called "willful misconduct," for which the "pleading requirements are similar to negligence but stricter": A plaintiff must show "(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." *Berkley v.*

though, it effectively raised the bar concerning what Plaintiffs must allege to avoid a motion to dismiss. As a result, even when the underlying state statute does not itself require "knowing" action, plaintiffs must now allege and, ultimately, prove such actions to survive PLCAA preemption.[15]

In short, Plaintiffs have presciently undertaken to prove that Defendants knew the impact of their actions and undertook them anyway, even though the underlying state statutes require only that Defendants should have known, and not that they actually knew, the impact of their actions. Because Plaintiffs have adequately and specifically pleaded actual knowledge, they have shown "knowing[ ] violat[ions]" of the California statutes that form the basis for their suit. 15 U.S.C. 7903(5)(A)(iii).

Understanding the phrase "knowingly violated" as imposing a heightened pleading requirement for litigants

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Dowds, 152 Cal. App. 4th 518, 526-28, 61 Cal. Rptr. 3d 304 (2007) (internal alterations, quotation marks, and citations omitted). The PLCAA, on my reading, would require something slightly more onerous: a showing of actual, not constructive, knowledge of all the elements that establish a violation of law.

[15] When Congress is acting in an area over which it has constitutionally delegated authority, there is nothing particularly unusual about a federal statute adding to the proof burdens that would be applicable under state law. *See, e.g., Gorman v. Wolpoff & Abramson, LLP*, 552 F.3d 1008, 1025-27 (9th Cir. 2009) (holding that the Fair Credit Reporting Act permits state defamation claims to avoid preemption, if at all, only if plaintiffs plead and prove "malice or willful intent," a mens rea not inherent in most state defamation actions); *800 Adept, Inc. v. Murex Securities, Ltd.*, 539 F.3d 1354, 1369 (Fed. Cir. 2008) ("State tort claims against a patent holder, including tortious interference claims, based on enforcing a patent in the marketplace, are 'preempted' by federal patent laws, unless the claimant can show that the patent holder acted in 'bad faith' in the publication or enforcement of its patent.").

who seek to come within the predicate exception thus gives sense and structure to an otherwise ambiguous provision. 15 U.S.C. 7903(5)(A)(iii). Having located the predicate exception's limiting factor, it makes sense to read the term "applicable" broadly, encompassing statutes that are "capable of being applied" to the sale or marketing of firearms, as Cal. Civ. Code §§ 1719 and 3479-80 certainly are.

B.

My interpretation of the predicate exception is fully consistent with surrounding provisions of the PLCAA's text. Unlike the majority, I read the PLCAA's text as strongly supporting the view that the Act's purpose is to protect firearms manufacturers and sellers from liability for acts solely those of third parties.

First, according to the PLCAA's "Purposes" section, the purpose of the Act is "[t]o prohibit causes of action against manufacturers [and sellers] . . . for the harm *solely* caused by the criminal or unlawful misuse of firearm products or ammunition products by others." 15 U.S.C. § 7901(b)(1) (emphasis added). The majority ignores Congress's use of the word "solely," reading this provision to suggest that Congress's intention was "to preempt common-law claims, such as general tort theories of liability." Maj. Op. at 1136. I disagree. The purpose articulated at § 7901(b)(1) is, by its own terms, not to reject tort theories of liability in *general*, but rather to prevent claims alleging strict or vicarious liability.

Indeed, the PLCAA repeatedly describes the sorts of law-suits with which Congress was concerned as lawsuits based particularly on vicarious liability theories. *See* 15 U.S.C. §§ 7901(a)(3) ("harm caused by the misuse of firearms by third parties"); 7901(a)(5) ("harm caused by those who criminally or unlawfully misuse firearm prod-

ucts or ammunition products that function as designed and intended"); 7901(a)(6) ("harm that is solely caused by others"). Reading the predicate exception to encompass only lawsuits alleging that defendants themselves knowingly engaged in unlawful conduct is fully consistent with this purpose, as such a reading would preclude the filing of suits that allege liability arising solely out of acts taken by third parties which the defendants failed to correct or prevent.

Second, the majority notes that the PLCAA elsewhere speaks of "Federal, State, and local laws" that "heavily regulate[ ]" the manufacture and sale of firearms, 15 U.S.C. § 7901(a)(4), and it concludes that Congress likely had only this narrow subset of laws (apparently, firearm-specific laws and regulations) in mind when drafting the predicate exception as well. Maj. Op. at 1136. I draw precisely the opposite conclusion from Congress's choice of language in § 7901(a)(4). That subsection speaks of "Federal, State, and local *laws*" (not "statutes") that "heavily *regulate* [ ]" (rather than "apply to") firearms. *Id.* § 7901(a)(4) (emphases added). If Congress had intended the predicate exception to reach only those statutes *specifically regulating* the sale or marketing of firearms, to which it appears § 7901(a)(4) refers, surely the more straightforward way to do so would be to mirror the language of § 7901(a)(4) more closely. *See Boise Cascade Corp. v. United States Envtl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("[W]e presume that words used more than once in the same statute have the same meaning."). Instead, Congress chose to use the broader phrase "State or Federal statute[s] applicable to the sale or marketing of [firearms]" in the predicate exception. *Id.* § 7903(5)(A)(iii). If any inference can be drawn from this difference in language,

it is not that § 7901(a)(4) and § 7903(5)(A)(iii) should be read as coterminous, as the majority suggests, but that they should be read differently. *See Tang v. Reno*, 77 F.3d 1194, 1197 (9th Cir. 1996) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Third, the majority states that "Congress'[s] intention to create national uniformity"—an intention to which the PLCAA adverts only indirectly, in the "Purposes" section at 15 U.S.C. § 7901(b)(4) ("[t]o prevent . . . unreasonable burdens on interstate . . . commerce")—is incompatible with a reading of the predicate exception that would allow Plaintiffs' claims to survive. Maj. Op. at 1136. I disagree here as well. Reading the predicate exception to impose an actual knowledge requirement on litigants *does* create a nationally uniform baseline standard of liability. At the same time, this reading also accommodates another of the PLCAA's stated purposes—"preserv[ing] and protect[ing] the important principles of federalism [and] State sovereignty," 15 U.S.C. § 7901(b)(6)—by allowing the continued enforcement of state laws that, like California's, reflect the considered policy choices of the legislature. It is worth noting, in this regard, that the California Penal Code specifically states that the unlawful possession of a firearm is a nuisance. *See* Cal. Penal Code § 12028(b). And several years after Defendants committed the acts alleged in Plaintiffs' complaint, the California legislature amended the negligence statute to specify that "[t]he design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this sec-

tion." Cal. Civ. Code § 1714(a); *see also* A.B. 496, 2002 Cal. Legis. Serv. 906 (West) (2002).

I therefore conclude that the PLCAA's text is fully consistent with the reading of the predicate exception I have suggested: that "statute[s] applicable to the sale or marketing of [firearms]" includes any statutes capable of being applied to the sale or marketing of firearms, but that to proceed under the exception, litigants must allege that defendants "knowingly violated" those statutes. 15 U.S.C. § 7903(5)(A)(iii). Far from "ignor [ing] the text and purpose of[the] statute," *see* Maj. Op. at 1138 n.8 (quoting *Boumediene v. Bush*, -- U.S. —, 128 S. Ct. 2229, 2271, 171 L. Ed. 2d 41 (2008)), I think this to be an entirely fair reading of the PLCAA.

C.

DeBartolo counsels that courts employing the canon of constitutional avoidance look not only to the statutory text, but also to the legislative history, to ensure that their reading of the statute is not contrary to Congress's clear intent. *DeBartolo*, 485 U.S. at 583-84, 108 S. Ct. 1392; *see also Catholic Bishop*, 440 U.S. at 504, 99 S. Ct. 1313. Unlike the majority, I read the PLCAA's legislative history not to foreclose the reading I suggest here, but rather in large part to support it.

Senator Sessions, one of the bill's leading supporters, stated that "[t]his bill is incredibly narrow. It only forbids lawsuits brought against lawful manufacturers and sellers of firearms or ammunition if the suits are based on criminal or unlawful misuse of the product by a third party." 151 Cong. Rec. S8908 (July 26, 2005) (statement of Sen. Sessions). Reading through the legislative history, it becomes clear that like Senator Sessions, the bill's supporters broadly understood that the PLCAA would not do away with all tort liability, but rather that it

would (1) limit firearms manufacturers or sellers' tort liability to their *own conduct*, not the conduct of third parties (thus imposing a narrow view of foreseeability and proximate cause), and (2) impose an extra "knowledge" requirement on state-defined duties of care.[16] The bill

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[16] *See, e.g.*, 151 Cong. Rec. S9088 (July 27, 2005) (statement of Sen. Craig) ("[This bill] does not prevent [gun manufacturers and sellers] from being sued for their own misconduct. This bill only stops one extremely narrow category of lawsuits[:] lawsuits that attempt to force the gun industry to pay for the crimes of third parties over whom they have no control. We have tried to make that limitation as clear as we possibly can. . . ."); *id.* (statement of Sen. Craig) ("This bill responds to a series of lawsuits filed primarily by municipalities to shift the financial burden for criminal violence onto the law-abiding business community. These suits are based on a variety of legal theories . . . . seeking to hold gun manufacturers and sellers liable for the cost of injuries caused by people over whom they have no control—criminals who choose to use firearms illegally."); *id.* at S9089 (statement of Sen. Craig) ("This is not a gun industry immunity bill. It prohibits one kind of lawsuit[:] a suit trying to fix the blame of a third party's criminal acts or misdeeds on the manufacturer or the seller of the firearm used in that crime."); 151 Cong. Rec. S8908-11 (July 26, 2005) (statement of Sen. Sessions) ("Manufacturers and sellers are still responsible for their own negligent or criminal conduct . . . ."); *id.* ("It is simply wrong . . . to allow those manufacturers who comply with the many rules we have set forth . . . to be sued for intervening criminal acts . . . . [But][i]f they knew, if they had reason to know, if they were negligent in going through the requirements of the law or failed to do the requirements of the law, they can [still] be sued [despite the PLCAA]"); *id.* at S8911 (statement of Sen. Sessions) ("Plaintiffs can go to court if the gun dealers do not follow the law, if they negligently sell the gun, if they produce a product that is improper or they sell to someone they know should not be sold to or did not follow steps to determine whether the individual was [eligible] to buy[ ] a gun."); 151 Cong. Rec. S9226 (July 28, 2005) (statement of Sen. Graham) ("What . . . [this bill will prohibit are suits that seek] under a gross negligence or simple negligence standard [to] create a duty on the part of sellers and manufacturers for an event that they can't

was viewed essentially as a tort-reform measure, aimed at restraining the supposed expansion of tort liability beyond its "traditional[ ]" boundaries, 151 Cong. Rec. S8910 (July 26, 2005) (statement of Sen. Sessions), particularly by "activist judge[s]" and municipalities suing the gun industry on public nuisance and strict liability theories. *Id.* at S8911.[17] Suits for the wrongful acts of

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control which is the intentional misuse of a weapon to commit a crime. . . .").

[17] *See* 151 Cong. Rec. S9088 (July 27, 2005) (statement of Sen. Craig) ("This bill responds to a series of lawsuits filed primarily by municipalities to shift the financial burden for criminal violence onto the law-abiding business community."); *id.* at S9088-89 (statement of Sen. Craig) (characterizing the "junk lawsuits" that the PLCAA would prohibit as threatening to "reverse a longstanding legal principle in this country . . . that manufacturers of products are not responsible for the criminal misuse of those products"); 151 Cong. Rec. S9378 (statement of Sen. Sessions) ("We ha[ve] a group of activist, anti-gun litigators who sometimes buddy up with a city or mayor somewhere—usually a big city—and try to conjure up some way to make a legitimate manufacturer of a firearm liable for intervening acts of criminals and murderers. That has never been the principle of American law, but it is a reality that is occurring today and it threatens an industry that supplies our military with weapons.").

Relatively little of the debates focused on tort suits brought by injured *individuals*, as opposed to municipalities. *But see* 151 Cong. Rec. S9386 (July 29, 2005) (statement of Sen. Reed) (advocating an amendment, which ultimately failed, that would have "preserve[d] the right of an individual to sue for negligence when they have been harmed and when that negligence can fairly be attributed to a gun manufacturer . . . [or] dealer . . . . [I]f we are confronted with this legislation, I propose we step back and perhaps reluctantly eliminate suits by municipalities, but for goodness sakes, we can have and maintain suits by individuals. . . . At a minimum, we have to allow the tort law of the various States . . . to be operative . . . ."); *id.* at S9389 (July 29, 2005) (statement of Sen. Allen) (supporting the bill as written, and stating that "[t]his legislation does carefully preserve the right of individuals to have their day in court with civil liability

firearms manufacturers and sellers themselves were not the focus of the dismissal provision.

I recognize, of course, that individual legislators at times suggested divergent views of what sorts of lawsuits the PLCAA would affect if it were passed into law.[18] Some of those views appear perhaps implausibly narrow or implausibly broad, likely because the bill excited strong emotions from both its supporters and its opponents. As courts have long cautioned, however, the statements of single lawmakers do not establish congressional intent. *Thompson v. Calderon*, 151 F.3d 918, 928-29 (9th Cir. 1998) ("[I]ndividual senators do not make laws; majorities of the House and Senate do."); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979). That is why committee reports are more persuasive indicators of "the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) (internal quotation marks omitted); *see also Gen. Elec. Co. v. EPA*, 360 F.3d 188, 193-94 (D.C. Cir. 2004) (the broad reading of an ambiguous statutory pre-

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actions for injury or danger caused by negligence on the firearms dealer or manufacturer['s part] or defective product. . . .").

[18] *Compare* 151 Cong. Rec. S9226 (July 28, 2005) (statement of Sen. Kyl) (supporting the bill and opposing an amendment that would have expressly permitted suits alleging gross negligence or recklessness to go forward; arguing that the bill as written already would allow suits alleging "gross negligence or reckless conduct . . . [as] the proximate cause of death or injury"), *and* 151 Cong. Rec. S9926 (July 25, 2005) (statement of Sen. Graham) (same), *with* 151 Cong. Rec. S9385 (July 29, 2005) (statement of Sen. Schumer) (opposing the bill as written, and arguing that "[e]ven when somebody is grossly negligent . . . they will" be immune from suit), *and id.* at S9380 (statement of Sen. Kennedy) (same).

emption provision put forward in the "floor statement by a single senator" is "hardly persuasive evidence of congressional intent" in the face of committee reports that read the provision more narrowly).

Here, the House Judiciary Committee Report confirms the picture that emerges from the legislative history as a whole—that the PLCAA was intended to preclude the imposition of strict or vicarious liability on the gun industry for the criminal actions of third parties. The House Report describes the bill as aimed at combating a trend of "[r]ecent litigation . . . against the firearms industry . . . based on novel claims that invite courts to dramatically break from bedrock principles of tort law," H.R. REP. NO. 109-124, at 11 (2005), and to hold firearms manufacturers and sellers "liable for the injuries caused by the criminal action of third parties." *Id.* at 6.[19]

Reading the predicate exception as preserving causes of action for injuries caused by gun manufacturers and sellers' own knowingly unlawful conduct is fully consistent with that view.

The majority correctly points out that both Senator Craig and Representative Stearns listed *Ileto v. Glock* among the lawsuits that they expected the PLCAA would preempt. *See* Maj. Op. at 1137-38. But there is no

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[19] Like the floor debates, much of the House Report focuses on the perceived need to curtail lawsuits brought by municipalities, rather than those brought by individuals. *See id.* at 18 (describing municipal plaintiffs as attempting to "regulate firearms whereas only the State had the power to regulate in this area"); *id.* at 13 ("The various public entities that have brought suit against the gun industry in recent years have raised novel claims that seek reimbursement of government expenses—including costs for police protection, emergency and medical services, and pension benefits—associated with gun-related crimes."). (No Senate Report was published.)

indication in their descriptions of the case that these lawmakers actually understood what Plaintiffs were alleging in this case: that Defendants themselves *knowingly* committed unlawful acts. Quite the contrary, Senator Craig and Representative Stearns's remarks suggest that they believed *Ileto* was purely a vicarious liability suit.[20] Whatever effect these two lawmakers *thought* the PLCAA would have on Plaintiffs' suit, their apparently ill-informed projections do not amount to "clear congressional intent" to enact a law that would immunize firearms manufacturers and sellers from tort liability for even their *own knowing* unlawful acts. *DeBartolo*, 485 U.S. at 574, 108 S. Ct. 1392.

D.

Applying the PLCAA's predicate exception as written—that is, as applying to all statutes capable of being applied to the sale or marketing of firearms, but imposing an actual knowledge requirement—would prohibit a swath of lawsuits against firearms manufacturers and sellers, including those brought by municipalities for violations of no-fault or absolute liability statutes or those brought by individuals alleging vicarious liability under

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[20] *See* 151 Cong. Rec. S9394 (July 29, 2005) (statement of Sen. Craig) ("Another example of a lawsuit captured by this bill is the case of *Ileto v. Glock* . . . . The United States Ninth Circuit Court of Appeals said Glock and RSR could be sued for a criminal shooting when Glock sold the pistol to a Washington State police department and the distributor RSR never owned, nor sold, nor possessed the firearm."); 151 Cong. Rec. E2163 (Oct. 25, 2005) (statement of Rep. Stearns) (extensions of remarks) ("Another example is the case of *Ileto v. Glock* . . . . The facts, if you can believe it, are that the manufacturer, Glock, sold the pistol later criminally misused, to a Washington State police department and the distributor being sued never owned, sold, nor possessed the firearm that was criminally misused.").

state tort law for the conduct of third parties of which the gun manufacturers or sellers were not aware.

It may well be that the PLCAA's application to these other state actions would be constitutionally problematic for the same reasons outlined in Part II above. The reading of the predicate exception's ambiguous language I have suggested might simply delay those hard constitutional questions for another case. But that is, ultimately, what the canon of constitutional avoidance is meant to do.[21] The legislation or the constitutional law could change in the meantime, or no concrete case could arise in which the constitutional issue needs to be addressed. The reading I have suggested here would resolve the case in front of us, allowing Plaintiffs' suit to go forward and leaving the constitutional issue for another day, should that day arise.

CONCLUSION

I would hold that the PLCAA does not require the dismissal of Plaintiffs' suit, and not decide the difficult questions of constitutional law that the statute would otherwise raise. I therefore respectfully dissent.

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[21] The majority asserts that the "point" of the constitutional avoidance canon "is to adopt an alternative interpretation of the statute that avoids *any* constitutional problem." Maj. Op. at 1143 n.12 (emphasis added). But surely, that is not so. The point, rather, is avoid constitutional questions actually *raised* by a given case. Whatever constitutional problems might be raised in other cases—or even in this one at a later stage in the litigation, if Plaintiffs were unable to prove the knowing conduct they have pleaded and could show only negligence—are not before us today, and cannot guide our choice between two plausible readings of the statute when one would raise a serious constitutional question in *this* case.

APPENDIX B
UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

NO. CV 01-9762ABC(RNBX)

LILIAN S. ILETO, ET AL.,
Plaintiffs,

v.

GLOCK, INC., ET AL.,
Defendants.

MARCH 14, 2006

ORDER RE: DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

COLLINS, District Judge.

Defendants' Motion for Judgment on the Pleadings came on for hearing on March 6, 2006. Having considered the parties' submissions, the case file, and counsels' arguments, the Court GRANTS Defendants' Motion.

PROCEDURAL HISTORY

This case stems from the tragic events of August 10, 1999, in which Bufford Furrow first shot several children at the North Valley JCC and then shot and killed postal worker Joseph Santos Ileto. Plaintiffs Lilian Santos Ileto, sole surviving parent of the deceased; Joshua Stepakoff, a minor through his parents, Loren Lieb and Alan B. Stepakoff; Mindy Finkelstein, a minor, by her parents,

David and Donna Finkelstein; Benjamin Kadish, a minor through his parents, Eleanor and Charles Kadish; and Nathan Powers, a minor through his parents, Gail and John Michael Powers, filed a Complaint in Los Angeles Superior Court on August 9, 2000, against Defendants Glock, Inc.; Glock GmbH; China North Industries Corp. ("China North" or "Norinco"); Davis Industries; Republic Arms, Inc.; Jimmy L. Davis; Maadi; Bushmaster Firearms; Imbel; The Loaner Pawnshop Too; David McGee; and 150 Doe Defendants. The Complaint alleged seven causes of action. The first two claims were brought by Ms. Ileto against all Defendants, for survival and wrongful death. The remaining five claims, which included a claim for negligence and a claim for public nuisance, were brought by all plaintiffs against all defendants. The Complaint sought certification of a class, damages, and injunctive relief.

Plaintiffs filed a First Amended Complaint ("FAC") on May 23, 2001. The FAC retained Ms. Ileto's survival and wrongful death claims and Plaintiffs' negligence and public nuisance claims. Plaintiffs did not reassert their remaining claims, including the class claims and the claim for injunctive relief. Plaintiffs did, however, name two additional defendants, RSR Management Corporation and RSR Wholesale Guns Seattle, Inc. (collectively, "RSR").

On October 17, 2001, China North was first served with the initial Complaint. Thereafter, on November 14, 2001, China North removed the action to this Court under 28 U.S.C. § 1330 and 28 U.S.C. § 1603. Defendants then moved to dismiss the case, arguing that even if all of the alleged facts were true, Plaintiffs had nevertheless failed to state a legally cognizable claim. This Court agreed and, accordingly, granted the motions to dismiss.

On appeal, however, the Ninth Circuit reversed this Court's Order as to Plaintiffs' negligence and public nuisance claims and remanded the case back to this Court.[1] Of all the defendants named in the First Amended Complaint, only three remain on remand: Glock, RSR, and China North.

FACTUAL BACKGROUND

1. Allegations in the First Amended Complaint

The allegations in Plaintiffs' First Amended Complaint have been thoroughly summarized in two published opinions. *See Ileto v. Glock*, 194 F. Supp. 2d 1040 (C.D. Cal. 2002); *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003), *rehearing en banc denied*, 370 F.3d 860 (9th Cir. 2004), *cert. denied*, 543 U.S. 1050, 125 S. Ct. 865, 160 L. Ed. 2d 770 (2005). Below, the Court quotes the Ninth Circuit's summary of those allegations:

"On August 10, 1999, Furrow approached the North Valley JCC in Granada Hills, California, carrying firearms manufactured, marketed, imported, distributed, and/or sold by the defendants named in this case. When Furrow purchased these guns and at the time of the shooting, federal law prohibited him from possessing, purchasing, or using any firearm.[2] Furrow allegedly had

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[1] Plaintiffs did not appeal the Court's decision to dismiss their other claims.

[2] "Furrow had been committed to a psychiatric hospital in 1998, indicted for a felony in 1998, and convicted of assault in the second degree in 1999 in the state of Washington. Federal law prohibits a person with a mental defect who has been committed to a mental institution and/or convicted of a felony from purchasing a gun. This prohibition is contained in 18 U.S.C. § 922(d), which provides in pertinent part:

at least the following guns in his possession: Glock Inc's ('Glock's') model 26, a 9mm handgun; China North Industries Corp's ('Norinco's') model 320, a 9mm short-barreled rifle; Maadi's model RML, a 7.62 caliber automatic rifle; Bushmaster's model XM15 E25, a .223 caliber rifle; two of Imbel's model L1A1, a .308 caliber rifle; and Davis Industries' model D 22, a .22 caliber handgun.

"Furrow entered the JCC with this arsenal and proceeded to shoot and injure three young children, one teenager, and one adult with his Glock gun. Two of the young children were plaintiffs Joshua Stepakoff ('Stepakoff'), who was six years old at the time of the shooting, and Benjamin Kadish ('Kadish'), who was five years old at the time of the shooting. Stepakoff was shot twice in the left lower leg and left hip, fracturing a bone. Kadish was shot twice in the buttocks and left leg, fracturing his left femur, severing an artery, and causing major internal injuries. Plaintiff Mindy Finkelstein ('Finkelstein'), a sixteen-year old camp counselor, was shot twice in her right leg. Plaintiff Nathan Powers ('Powers'), a four year-old boy, was not shot, but witnessed and experienced the shootings. The shootings terrified and shocked him, causing him to suffer great mental suffering, anguish,

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It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution . . . ."

and anxiety as well as severe shock to his nervous system. He suffered severe emotional distress as a result.

"Furrow then fled the JCC with the firearms, and came upon Ileto, a United States Postal Service worker, who was delivering mail in Chatsworth, California. Furrow shot and killed Ileto with his Norinco gun. Nine millimeter bullet casings were recovered at both crime scenes. The Norinco and the Glock guns in Furrow's possession were chambered for 9mm ammunition.[3]

. . .

"On May 23, 2001, the plaintiffs filed their thirty-seven page FAC [.] [Although Plaintiffs initially asserted a number of claims against the manufacturers, distributors, and dealers of the guns Furrow carried with him on the day of the shootings, only the plaintiffs' negligence and public nuisance claims remain.] Below, [the Court] sets forth the core allegations with respect to these claims."

A. Facts alleged in the Negligence Claim

"The first three claims in Count IV include general claims against all defendants, alleging that their 'deliberate and reckless marketing strategies caused their firearms to be distributed and obtained by Furrow resulting in injury and death to plaintiffs.' Plaintiffs also allege that the defendants intentionally produced more firearms than the legitimate market demands with the intent of marketing their firearms to illegal purchasers who buy guns on the secondary market. The plaintiffs also allege that the defendants breached their legal duty to the

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[3] "The FAC states that the Norinco, the Glock, and the Davis guns were chambered with 9mm casings. However, in an errata filed after the FAC, plaintiffs noted that only the Glock and the Norinco guns actually were chambered for 9mm ammunition."

plaintiffs 'through their knowing, intentional, reckless, and negligent conduct . . . foreseeably and proximately causing injury, emotional distress, and death to plaintiffs.'

"Plaintiffs allege that each of the firearms used by Furrow (the one allegedly used at the JCC, the one used to kill Ileto, and the ones not necessarily fired but carried by Furrow in his arsenal on the day of the shootings) were marketed, distributed, imported, promoted, or sold by each of the defendants in the high-risk, crime-facilitating manner and circumstances described herein, including gun shows, 'kitchen table' dealers, pawn shops, multiple sales, straw purchases, faux 'collectors,' and distributors, dealers and purchasers whose ATF crime-trace records or other information defendants knew or should have known identify them as high-risk. Defendants' practices knowingly facilitate easy access to their deadly products by people like Furrow.

"With respect to Glock, plaintiffs specifically alleged that Glock targets its firearms to law enforcement first to gain credibility and then uses the enhanced value that comes with law enforcement use to increase gun sales in the civilian market. They contend that Glock guns are safe and appropriate for use by well trained elite offensive police forces, but are not appropriate for civilians or unskilled users. In addition, Glock and its distributors encourage police departments to make trade-ins earlier than necessary or originally planned so that they can sell more firearms to the police and sell the former police guns at a mark-up on the civilian market. Glock knows that by over-saturating the market with guns, the guns will go to the secondary markets that serve illegal purchasers.

"The gun that Furrow used to shoot and kill Ileto was purchased originally by a police department in the state of Washington. The plaintiffs allege that Glock and its distributor, RSR Seattle, arranged for the sale of the gun to the police department and its subsequent sale to gun dealers to facilitate the creation of an illegal secondary gun market. The gun was initially shipped to the Cosmopolis Police Department in Washington State along with another gun of the same model. Within one week, the police department determined that the guns were too small to fit into a large person's hand and decided to exchange the guns for another Glock model. The Cosmopolis Police Department contacted a former Police reserve officer, Don Dineen ('Dineen'), who had a gun store in Cosmopolis, to complete the exchange. Dineen contacted RSR Seattle, a Glock distributor, to request two new Glock guns for a trade with the Cosmopolis Police Department. RSR shipped the two guns to Dineen and agreed that payment did not have to be made for the new guns until Dineen was able to sell the former police guns. In a transaction with the police department, Dineen exchanged the two new Glock guns for the two Glock guns rejected by the Department at no cost to the Department. Dineen then was able to sell one of the former Police Department Glock guns at a reduced price to David Wright, a man who claimed to be a gun collector.

"Dineen had introduced Wright to another 'gun collector'[4] named Andrew Palmer, knowing that neither Wright nor Palmer had firearms licenses, and therefore

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[4] "The Complaint alleges that these 'gun collectors' do not actually collect guns for any purpose other than to sell them without having to comply with the firearm registration system and background checks with which gun store owners must comply with when they sell a gun."

that they did not have to obtain background checks on their purchasers. Dineen also knew that Wright and Palmer frequently sold and traded guns at gun shows in Spokane, Washington, which is near Hayden Lake, Idaho, the home of the Aryan Nations and the Neo Nazi group of which Furrow was a member. Indeed, Wright sold the Glock gun to Palmer at a gun show in Spokane, Washington; at this same gun show, it is alleged that Furrow purchased the Glock gun used in the JCC shootings from Palmer.

"Plaintiffs alleged that all the defendant gun manufacturers and distributors produce, distribute, and sell more firearms than legal purchasers can buy, and that they all 'knowingly participate in and facilitate the secondary market where persons who are illegal purchasers and have injurious intent obtain their firearms.' Furthermore, the plaintiffs allege that the defendant manufacturers and distributors 'select and develop distribution channels they know regularly provide guns to criminals and underage end users. Defendant manufacturers and distributors have been specifically so informed [by the ATF [5] in connection with [its] crime-gun trac[ing] efforts [.]' Despite this knowledge and information documenting the path of guns to illegal purchasers, the defendant manufacturers and distributors fail to exercise reasonable care to protect the public from the risks created by the distribution and marketing schemes that create an illegal secondary market. Defendants' contracts with their distributors and dealers, and the defendant distributors' contracts with their dealers do not include provisions to address the risks associated with prohibited purchasers.

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[5] "The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is a law enforcement agency within the United States Department of Justice."

Defendants gain significant revenue from the illegal secondary gun market and therefore fail to adopt the most basic policies and practices that would help to decrease greatly the number of guns reaching prohibited purchasers.

"Plaintiffs further alleged that the defendants create and control the distribution channels that provided Furrow, an illegal purchaser and user, with the firearms he used to kill Ileto and to injure the other victims. Defendants knew which distributors and dealers provided guns to illegal purchasers. Defendants knew that their negligent conduct created an unreasonable risk of harm to people like the plaintiffs and that the subsequent creation of an illegal secondary gun markets was a substantial factor contributing to the injuries the plaintiffs suffered. Finally, plaintiffs alleged damages for 'numerous compensable injuries suffered by plaintiffs [that] include but are not limited to personal injury, death, pain and suffering, severe emotional distress, lost companionship, medical expenses, and lost income.'

B. Facts alleged in the Nuisance Claim

"Plaintiffs also allege that the defendants' marketing and distribution policies 'knowingly created and maintained an unreasonable interference with rights common to the general public, constituting a public nuisance under California law.' Plaintiffs allege that defendants market, distribute, promote, and sell firearms, a lethal product, with reckless disregard for human life and for the peace, tranquility, and economic well being of the public. They have knowingly created, facilitated, and maintained an over-saturated firearms market that makes firearms easily available to anyone intent on crime. The particular firearms used in these incidents were marketed, distributed, imported, promoted, and

sold by defendants in the manner set out herein, which defendants knew or should have known facilitates and encourages easy access by persons intent on murder, mayhem, or other crimes, including illegal purchasers such as Furrow. Their conduct has thereby created and contributed to a public nuisance by unreasonably interfering with public safety and health and undermining California's gun laws, and it has resulted in the specific and particularized injuries suffered by plaintiffs.

"Although defendants knew about precautions they could have taken to decrease access by prohibited purchasers of their products, they 'knowingly establish[ed], suppl[ied], and maintain[ed] an over-saturated firearms market that facilitates easy access for criminal purposes, including access by persons prohibited to purchase or possess firearms under state or federal law.' Defendants' actions make the public vulnerable to crime and assault and their conduct 'obstructs the free passage or use . . . of the public parks, squares, streets, and highways within the meaning of California Penal Code § 370.' As alleged in the FAC, the defendants' interference with rights common to the public is unreasonable and constitutes a nuisance because:

> It significantly interferes with the public safety, health or peace. This interference is not insubstantial or fleeting, but rather involves a disruption of public peace and order in that it adversely affects the fabric and viability of the entire community, and a substantial number of persons, within the meaning of California Civil Code § 3480
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> . . .
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> It is continuing conduct, and it has produced a permanent or long-lasting effect, and defendants know or have reason to know that it has a significant

> effect upon the public right. Defendants continually engage in their reckless conduct even though they are continually informed of the resulting substantial, permanent, and long-lasting harm and even as they receive daily notice from the ATF of the distribution channels they use that are doing the most harm. Defendants have reason to know-and actually know [-] of the disastrous, continuing, and long-lasting effects of their conduct on the public
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> . . .
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> Though not necessarily proscribed per se by law, defendants' conduct nevertheless undermines state and federal law restricting gun sales and possession and renders enforcement of such laws difficult or impossible. In this sense, defendants' interference with a common public right is contrary to public policy as established by state and federal law, and the interference is therefore unreasonable.

Plaintiffs seek damages for injuries they suffered as a result of defendants' creation of a public nuisance." *Ileto*, 349 F.3d at 1195-99.

2. The Protection of Lawful Commerce in Arms Act

On October 26, 2005, the President of the United States approved the Protection of Lawful Commerce in Arms Act (the "PLCAA" or "Act"), Pub. L. No. 109-92, 119 Stat. 2095. 15 U.S.C. §§ 7901-03 (2005). The PLCAA provides immunity to firearms manufacturers and dealers from any lawsuit, pending or otherwise, fitting the Act's definition of a "qualified civil liability action." *Id.* §§ 7902-03.

The PLCAA defines a "qualified civil liability action" as an action against "a manufacturer or seller of a qualified product, or a trade association" for any type of dam-

ages or equitable relief "resulting from the criminal misuse" of a firearm. *Id.* § 7903(5)(A).[6] The Act, however, provides six exceptions to this definition. *Id.* § 7903(5)(A)(i)-(iv).[7] Assuming a given action against a

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[6] Section 7903(5)(A), in pertinent part, states:

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party[.]

15 U.S.C. § 7903(5)(A).

[7] The exceptions to a "qualified civil liability action are as follows:

> (i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;
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> (ii) an action brought against a seller for negligent entrustment or negligence per se;
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> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—
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> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
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> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

firearms manufacturer or dealer falls within one of these exceptions, the action can proceed.

Two provisions of the PLCAA are particularly relevant to this case. The first is the Act's retroactive provision, which requires the "immediate [ ] dismiss[al]" of any "pending action" fitting the Act's definition of a "qualified civil liability action." *Id.* § 7902(b). The second concerns one of the six exceptions to the definition of a "qualified civil liability action"—specifically, the exception located at § 7903(5)(A)(iii) ("the predicate exception"). Under the predicate exception, firearms manufacturers and dealers are still liable if they "knowingly violated a State or Federal statute applicable to the sale or marketing" of a firearm, and the violation proximately caused the harm for which relief is sought. *Id.* § 7903(5)(A)(iii).

On November 9, 2005, just two weeks after the PLCAA became effective, Defendants Glock and RSR (hereinafter, "Defendants") filed a Motion for Judgment on the Pleadings. Therein, they argue that each of Plaintiffs' causes of action meets the PLCAA's definition of a "qualified civil liability action."

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26."

15 U.S.C. § 7903(5)(A)(i)-(iv).

On December 21, 2005, Plaintiffs filed an Opposition to Defendants' Motion. In their Opposition, Plaintiffs maintain that this lawsuit should not be dismissed for two reasons. First, Plaintiffs contend that each of their claims falls within the predicate exception to the PLCAA. Second, they assert that, even if their claims fall outside of the predicate exception, the Court should not dismiss their causes of action because the PLCAA, as applied to Plaintiffs, is unconstitutional. Defendants filed a Reply on January 17, 2006.

Because Plaintiffs' Opposition challenged the constitutionality of the PLCAA, the Government intervened for the limited purpose of rebutting this challenge. Thereafter, on January 17, 2006, the Government filed a memorandum supporting the constitutionality of the PLCAA. On February 16, 2006, Plaintiffs filed a Reply to the Government's memorandum.

DISCUSSION

A. Neither of Plaintiffs' Causes of Action Fall Within the Predicate Exception to the PLCAA.

Plaintiffs contend that the PLCAA does not require the dismissal of their suit because each of their causes of action falls within the predicate exception. Specifically, Plaintiffs note that each of their causes of action alleges that Defendants violated a California statute that is capable of being applied to the sale or marketing of firearms. Accordingly, they conclude that the plain language of the statute, and of the predicate exception in particular, dictates that this action falls outside the definition of a qualified civil liability action.

Defendants, on the other hand, contend that this suit is a prime example of the type of suit that the PLCAA was intended to prevent. According to Defendants, Plaintiffs' causes of action, each of which is based on a

violation of a generally applicable state statute, fall outside of the predicate exception. That exception, according to Defendants, was intended to apply only to violations of State and Federal statutes specifically applicable to the sale or marketing of firearms. To construe the predicate exception any other way, according to Defendants, would undermine the clear intent of the PLCAA. Accordingly, Defendants conclude that Plaintiffs' causes of action fall squarely within the definition of the PLCAA's definition of a "qualified civil liability action."

"The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute. The first step in ascertaining congressional intent is to look to the plain language of the statute." *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999) (citations omitted). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)).

"To determine the plain meaning of a particular statutory provision, and thus congressional intent, the court looks to the entire statutory scheme. If the statute uses a term which it does not define, the court gives that term its ordinary meaning." *Daas*, 198 F.3d at 1174. To determine the "plain meaning" of a term undefined by a statute, the court may resort to a dictionary. *Cleveland v. City of Los Angeles*, 420 F.3d 981, 990 (9th Cir. 2005). The court should be cautious of relying too heavily on dictionary definitions, however, because rigid adherence

to such definitions may result in an interpretation that conflicts with the legislature's intent in enacting the given statute. *See* Norman J. Singer, 2A Sutherland Statutory Construction § 46:2 (6th ed.); *see also United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003) (rejecting dictionary definition of "dwelling" in construing burglary statute because dictionary definition was broader than uniform federal definition).

Whether or not this case fits within the predicate exception to the PLCAA's definition of a "qualified civil liability action" hinges on what Congress meant when it used the word "applicable" in the predicate exception. As discussed below, the Court cannot apply the plain meaning of the word "applicable" in interpreting the PLCAA for two reasons. First, the word is ambiguous in light of other provisions within the PLCAA. Second, if the Court applies the plain meaning of "applicable," the resulting statutory meaning would undermine the clear purpose of the PLCAA. The Court addresses these reasons in turn below.

1. **The Word "Applicable" is Ambiguous as Used in the PLCAA.**

Although the plain meaning of the statute necessarily marks the beginning point in statutory construction, it does not follow that the Court must apply a literal interpretation of the statute in all instances. Where, for example, a given word or term in the statute is ambiguous, the court turns to the statute's legislative history for evidence of congressional intent. *United States v. Ventre*, 338 F.3d 1047, 1052 (9th Cir. 2003). A statute is ambiguous when it is capable of being understood by reasonably informed persons in two or more different senses. Singer, *supra* § 46:4.

In analyzing a statutory text, the court must avoid interpreting words in isolation. *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1066 (9th Cir. 1998). "[B]ecause words can have alternative meanings depending on context, we interpret statutes, not by viewing individual words in isolation, but rather by reading the relevant statutory provisions as a whole." *Id.* (internal quotations and citations omitted). This approach reflects the understanding that a provision that may seem ambiguous in isolation often becomes clear when considered against the statutory scheme or vice versa. *Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1051-52 (9th Cir. 2004).

As the Court considers the meaning of the predicate exception's use of the word "applicable," it notes that the meaning of this word has already been challenged in another court. Recently, in *City of New York v. Beretta*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005), a New York District Court addressed nearly identical arguments to those raised by the parties in this case. To determine Congress's intent, the district court looked to several dictionary definitions, which by and large defined the word "applicable" as "capable of being applied," or words to that effect. *Beretta*, 401 F. Supp. 2d at 261-62.[8] The district court also cited a handful of state and federal

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[8] "[T]he *Standard Dictionary* defines the word 'applicable' as follows: 'Applicable, capable of being applied; suitable or fit for application; relevant, fitting.' *Webster's Dictionary* contains the following definition: 'Capable of being applied; fit; suitable; pertinent.' *Black's Law Dictionary*, 3d Ed . . . defines the term as follows: 'Applicable, fit, suitable, pertinent, or appropriate.' The Oxford American Dictionary defines 'applicable' as 'that [which] may be applied.' *Oxford American Dictionary and Language Guide* 42 (1999)." *Beretta*, 401 F. Supp. 2d at 262 (citations and some internal quotations omitted).

cases that had interpreted "applicable" in the same manner, although none of those cases dealt with or interpreted any provision of the newly-enacted PLCAA. *Id.* (citing *Snyder v. Buck*, 75 F. Supp. 902, 907 (D.D.C. 1948); *Whalin v. Sears Roebuck & Co.*, No. 94 C 1518, 1995 WL 68823, at *3 (N.D. Ill. Feb. 13, 1995); *Interwest Constr. v. Palmer*, 923 P.2d 1350 (Utah 1996); *Whitney v. American Fidelity Co.*, 350 Mass. 542, 215 N.E. 2d 767 (1966)).

Based on these authorities, the *Beretta* Court found that the word "applicable" was unambiguous and, as such, readily understandable as "capable of being applied." *Id.* at 263-64. The district court further noted that Congress could have limited the reach of the predicate exception to violations of State and Federal statutes "'directly or specifically' regulating the sale or marketing of firearms," but failed to do so. *Id.* at 264. Accordingly, the *Beretta* Court concluded that Congress intentionally omitted such limiting language from the predicate exception. *See id.*

This Court respectfully disagrees with the *Beretta* Court's conclusion that the word "applicable" is not ambiguous. The Court's disagreement with this conclusion stems primarily from its view that the *Beretta* Court apparently defined and interpreted the word "applicable" without considering that definition in the context of the entire statutory scheme. Although the district court referred to the need to determine a phrase's meaning in context, it did so only to emphasize that "canons of construction cannot be used to avoid the plain meaning of a statute." *Id.* The *Beretta* Court, however, never actually analyzed how the word "applicable" operates in the context of the statutory scheme as a whole.

Although easily understood standing alone in the cold context of a dictionary, the word "applicable" nevertheless becomes ambiguous when read against the other provisions of the PLCAA.[9] For example, in the congressional findings section of the Act, Congress explicitly stated that firearm sales are heavily regulated by "Federal, State, and local laws." 15 U.S.C. § 7901(a)(4). In the following sentence, the legislature provided three different examples of these regulations—each of which is a federal law that specifically applies to the sale and marketing of firearms. *Id.*[10] Notably, this part of the statute, like the predicate exception, refers to State and Federal laws. Given this similarity, a reasonable person could surely conclude that the legislature's subsequent reference to violations of State and Federal statutes in the predicate exception likewise referred to the same type of State and Federal laws referenced earlier in the congressional findings.

Likewise, the examples of State and Federal statutory violations in the predicate exception itself also call into

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[9] Moreover, the Court finds the *Beretta* Court's reliance on state and federal case law defining the word "applicable" equally unpersuasive. Indeed, none of the cases cited by the district court addressed the word "applicable" as used in the PLCAA, nor could they have, considering that each such case predated the PLCAA. Thus, the Court fails to see how these courts' respective interpretations of completely unrelated statutes bears any relevance to the meaning of the word "applicable" in the specific context of the PLCAA.

[10] Section 7901(a)(4) states:

> The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

15 U.S.C. § 7901(a)(4).

question the meaning of the word "applicable." Neither of the examples implicates laws of general applicability, which would be merely "capable of being applied" to the sale or marketing of firearms. Instead, both examples involve violations of State and Federal laws that apply exclusively to the firearms industry. *See* 15 U.S.C. § 7903(5)(A)(iii)(I)-(II).[11] Because these examples refer only to State and Federal laws exclusive to the firearms industry, they strongly suggest that the word "applicable" in the lines preceding them likewise refers to State and Federal laws governing only firearms.

Although these specific examples by no means dictate the meaning of the general language preceding them at this stage in the Court's analysis,[12] they are nevertheless

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[11] Specifically, the examples in the predicate exception state the following:

> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
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> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18[.]

15 U.S.C. § 7903(5)(A)(iii)(I)-(II).

[12] In determining whether the word "applicable" is ambiguous, the Court does not apply the statutory doctrine of ejusdem generis, which translates simply as "of the same kind." The doctrine of ejusdem generis applies when general words in a statute are followed by specific words. In such a case, ejusdem generis limits the meaning of the general words to things that are similar to those specifically enumerated subsequently. Singer, *supra* § 46:2. But this

relevant to determining whether or not the word "applicable" is ambiguous. And while these examples do not, in and of themselves, render the word "applicable" ambiguous, they are not the only part of the statute that calls the meaning of the word "applicable" into question. Indeed, the examples must be read alongside the congressional findings about the heavy State and Federal regulations governing all aspects of the firearms industry—including sales. *See* 15 U.S.C. § 7901(a)(4).

In that context, the predicate exception's use of the word "applicable" gives rise to at least two reasonable meanings regarding knowing violations of State and Federal statutes. On the one hand, it could mean, as the *Beretta* Court found, that the exception applies to knowing violations of any State or Federal statute capable of being applied to the sale or marketing of firearms. On the other hand, it could just as easily mean that the exception applies only to knowing violations of State and Federal statutes specifically applicable to the firearms industry.

Additionally, rather than clarifying the issue, the relevant dictionary definitions only blur the meaning of the PLCAA's use of "applicable." Although "applicable" is often defined as "capable of being applied," the word "apply," from which "applicable" is derived, is defined in a way that would be most commonly understood as narrower than the sweeping "capable of being applied." Indeed, *Black's Law Dictionary* defines "apply" as either

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doctrine comes into play only after a court has concluded that the intent of Congress is unclear. *Id.*; *Microsoft Corp. v. C.I.R.*, 311 F.3d 1178, 1186 (9th Cir. 2002); *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 326 (8th Cir. 1982). Thus, it has no bearing on the Court's analysis at this stage because, here, the Court determines only whether the plain meaning of the word "applicable" is ambiguous.

"[t]o employ for a limited purpose" or "[to] put to use with a particular subject matter." *Black's Law Dictionary* 109 (8th ed. 2004); *see also Webster's Third Int'l. Dictionary* 105 (1993) (defining "apply" as "to use for a particular purpose or in a particular case").

Although, as the *Beretta* Court showed, these definitions are compatible when viewed from a purely intellectual point of view, they nevertheless differ when one considers their commonly understood meaning, which trumps all alternative meanings in statutory interpretation. *United States v. O'Neil*, 11 F.3d 292, 295 (1st Cir. 1993) ("[I]nflexible insistence upon a particular version of lexicographic orthodoxy seemingly overlooks that 'the plain-meaning doctrine is not a pedagogical absolute.'") (quoting *Greenwood Trust Co. v. Com. of Mass.*, 971 F.2d 818, 825 (1st Cir. 1992)). The Court finds it hard to believe that the average Congressman, let alone the average person, would equate the term "to put to use with a particular [or limited] subject matter" with the term "capable of being applied." The first term suggests a limitation; indeed, the term uses a restrictive word, namely "particular" or "limited." The second term, by contrast, invites the reader to consider the most expansive reach in determining the theoretical limits of applicability. Thus, while lexicographers could read these definitions in harmony, such a reading would ignore how these definitions are commonly understood.

This is not to say that the *Beretta* Court's interpretation of the predicate exception's use of the word "applicable" is by any means unreasonable. On the contrary, the district court set forth thoughtful arguments supporting its interpretation. Rather, it shows that reasonable minds could differ as to the meaning of "applicable" in the context of the entire statutory scheme.

In sum, for all of these reasons, the Court finds that the PLCAA's use of the word "applicable" in the predicate exception is ambiguous.

2. **Applying an Expansive Reading of the Word "Applicable" Would Undermine the Clear Purposes of the PLCAA.**

A court should not apply the plain meaning of a statute when doing so "would thwart the purpose of the overall statutory scheme or lead to an absurd result." *Brooks v. Donovan*, 699 F.2d 1010, 1011 (9th Cir. 1983) (citations omitted); *Albertson's Inc. v. Commissioner of Internal Revenue*, 42 F.3d 537, 545 (9th Cir. 1994) ("We may not adopt a plain language interpretation of a statutory provision that directly undercuts the clear purpose of the statute."); *Bob Jones University v. United States*, 461 U.S. 574, 586-92, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983) (finding that statute listing specific examples of tax-exempt organizations necessarily required organizations to serve a valid charitable purpose because interpreting statute otherwise would defeat bill's purpose).

When a statute governing a specific industry refers to compliance with undefined or unrestricted "laws," a court may interpret the statute as referring only to laws specifically applicable to the relevant industry. *See United States ex rel. North Santiam Watershed Council v. Kinross Gold, USA, Inc.*, No. C 96-3673-THE, 1998 WL 118176, at *5-6 (N.D. Cal. March 9, 1998). In Kinross Gold, for example, the court interpreted a provision of the General Mining Act of 1872 requiring mining companies seeking to obtain mineral asset rights to be in compliance "with the laws of the United States." *Kinross Gold*, 1998 WL 118176 at *1. Relying on this provision of the Mining Act, the plaintiff sued a group of mining companies for failing to comply with a federal

registration law that was not specifically related to federal mining laws. *Id.* Noting that Congress could not possibly have intended the Mining Act to require compliance with all federal laws, the district court found that the disputed term referred only to federal mining laws. *Id.* at *5-6. Thus, because the plaintiff based its claim on the mining companies' failure to comply with a non-mining-specific federal law, the claim was dismissed. *Id.* at *6.

Here, the clear purpose of the PLCAA was to shield firearms manufacturers and dealers from liability for injuries caused by third parties using non-defective, legally obtained firearms. *See, e.g.*, 15 U.S.C. § 7901(b)(1);[13] 15 U.S.C. § 7903(5)(A).[14] Congress also believed that lawsuits seeking to hold firearms manufacturers liable for a third party's misuse of a firearm im-

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[13] Section 7901(b)(1) states:

> The purposes of this chapter are as follows . . . [t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

15 U.S.C. § 7901(b)(1).

[14] Section § 7903(5)(A) states:

> The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party[.]

15 U.S.C. § 7903(5)(A).

posed an undue burden on interstate commerce. *See* 15 U.S.C. § 7901(a)(3),[15] (b)(4).[16]

Interpreting the word "applicable" in the predicate exception to mean any State or Federal statute "capable of being applied" to the sale or marketing of firearms would undermine this clearly stated purpose. Such a broad interpretation would create an exception so large that it would effectively render the entire PLCAA meaningless. Indeed, if a knowing violation of any statute capable of being applied to the sale of firearms could trigger the exception, one wonders whether the PLCAA would actually *expand* the firearms industry's scope of liability. *Cf.* 15 U.S.C. § 7901(a)(7) (criticizing "liability actions" against the firearms industry that run the risk of "expand[ing] civil liability" in ways not previously contemplated).

Moreover, construing the word "applicable" in the predicate exception to mean "capable of being applied" would undermine not only the PLCAA's over-arching purpose, but also other specific statutory provisions of the PLCAA. Indeed, such an interpretation invites creative attorneys to develop novel theories under

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[15] Section 7901(a)(3) states:

> Congress finds [that] . . . [l]awsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

15 U.S.C. § 7901(a)(3).

[16] Section 7901(b)(3) states:

> The purpose[ ] of this chapter [is] . . . [t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

15 U.S.C. § 7901(b)(3).

existing State and Federal statutes of general applicability to hold firearms manufacturers and dealers liable for the actions of third parties using "qualified" products. This result, however, flies in the face of Congress's stated disdain for applying such novel theories of liability against the firearms industry:

> Congress finds [that] . . . [t]he liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

15 U.S.C. § 7901(a)(7). This language forecloses any argument suggesting that Congress intended any provision of the PLCAA to allow, let alone encourage, the development of novel theories of liability based on violations of generally applicable State and Federal statutes. But this is precisely the result that would occur if the Court applies a literal interpretation of the word "applicable" to the predicate exception.

Likewise, interpreting "applicable" to mean "capable of being applied" would undermine Congress's goals of preserving the separation of powers and "important principles of federalism." *See id.* § 7901(b)(6). Congress

believed that groups were using "liability actions" as an end-run around the legislature to establish *de facto* stricter regulations on the firearms industry. *Id.* § 7901(a)(8).[17] This practice, according to Congress, "threaten[d] the Separation of Powers doctrine and weaken[ed] and undermin[ed] important principles of federalism, State sovereignty and comity between the sister States." *Id.* Congress, therefore, enacted the PLCAA, in part, to curb this perceived abuse of the legal system.

Rigidly adhering to the plain meaning of "applicable," however, would directly undermine this aspect of the PLCAA. Indeed, consider the facts of this case as an example. If Plaintiffs were to succeed in this action, the result would be that Defendants would have to change their behavior to avoid further liability in California, even if they did not violate any State or Federal laws specifically governing the sale or marketing of firearms.[18] This change in behavior, however, could not be limited to guns sold and marketed in California. Rather, it would necessarily extend to any area throughout the entire

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[17] Section 7901(a)(8) states:

> The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate inter-state and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

15 U.S.C. § 7901(a)(8).

[18] Plaintiffs do not argue that their case fits within any of the other exceptions to the definition of a "qualified civil liability action." *See* 15 U.S.C. § 7903(5)(A)(i)-(vi). Accordingly, the Court does not address those exceptions.

country where the possibility exists that a qualified product might find its way into California and later be misused by a third party. Consequently, a successful prosecution of this lawsuit would promote at least two things that the PLCAA sought to eliminate—namely, using litigation to circumvent the legislative branch and using such lawsuits to create an undue burden on interstate commerce. *See* 15 U.S.C. § 7901(a)(8), (b)(4), (b)(6).

Given these clear congressional findings and purposes, Congress could not have intended the predicate exception to apply whenever a firearms manufacturer or dealer knowingly violated a State or Federal statute capable of being applied to the sale or marketing of firearms. Rather, as in *Kinross*, where compliance with "all" federal laws made sense only if limited to laws specifically regulating the mining industry, the PLCAA's use of "applicable" likewise makes sense in the context of the statutory scheme only if it is limited to laws specifically applicable to the firearms industry.

Finally, interpreting "applicable" to mean "capable of being applied" ignores the other provisions in the statute referring to State and Federal laws specifically regulating the firearms industry. As discussed earlier, the PLCAA highlighted the fact that firearm sales, as well as all other aspects of the firearms industry, are "heavily regulated" by State and Federal laws. Moreover, the examples in the PLCAA of "knowing[ ] violat[ions] of State and Federal statutes" involve only violations of State and Federal laws exclusively applicable to the firearms industry, and to the sale of firearms specifically. While this fact, standing alone, would not be enough to override the statute's plain meaning, this fact must be considered in light of the Act's findings and purposes. In this context, it becomes clear that Congress did not in-

tend for the word "applicable" in the predicate exception to mean "capable of being applied."[19] Indeed, a contrary finding would require the Court to ignore the fact that every single example of a State or Federal statute mentioned, or referred to, in the PLCAA applies exclusively to the firearms industry. *See* 15 U.S.C. § 7901(a)(4); § 7903(5)(A)(iii)(I)-(II).

In short, the plain language of "applicable," as used in the predicate exception, conflicts with the clear purpose of the PLCAA.

3. **Extrinsic and Intrinsic Aids Show That Congress Intended the Predicate Exception to Apply Only to Violations of State and Federal Statutes Specifically Applicable to the Firearms Industry.**

Having found the plain meaning of the word "applicable" both ambiguous and contrary to the clear purpose of the PLCAA, the Court must now determine what Congress intended "applicable" to mean in the context of the predicate exception. To do so, the Court looks first to the legislative history and then to relevant canons of statutory construction. As explained below, both sources show that Congress intended the predicate exception to apply only to State and Federal statutes specifically governing the firearms industry.

a. **Legislative History of the PLCAA**

The legislative history of the PLCAA strongly indicates that Congress intended the predicate exception to apply only to knowing violations of State and Federal

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[19] At this point in the Court's analysis, the Court makes no definitive finding as to what Congress intended the word "applicable" to mean.

statutes specifically applicable to the firearms industry.[20] First, to the extent that any proponents of the bill mentioned violations of State or Federal laws, they referred only to violations of State and Federal laws specific to the firearms industry:

> "Let me again say, as I said, if in any way they violate State or Federal law or alter or fail to keep records that are appropriate as it relates to their inventories, they are in violation of law. This bill does not shield them, as some would argue. Quite the contrary. If they have violated existing law, they violated the law, *and I am referring to the Federal firearms laws that govern a licensed firearm dealer and that govern our manufacturers today.*"

151 Cong. Rec. S9087-01 (statement of Sen. Craig) (emphasis added).

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[20] Moreover, the Court notes that the clear legislative history further supports the Court's decision not to apply a literal meaning of the word "applicable" in the predicate exception. Even if the words of a statute are plain and unambiguous on their face, a court may still look to legislative history in construing a statute where the statute's plain meaning contradicts the expressed legislative intent in enacting the statute. *Escobar Ruiz v. I.N.S.*, 838 F.2d 1020, 1023 (9th Cir. 1988), overruled on other grounds by *Rueda-Menicucci v. I.N.S.*, 132 F.3d 493 (9th Cir. 1997); *Flores-Arellano v. I.N.S.*, 5 F.3d 360, 363 (9th Cir. 1993) ("Under the established approach to statutory interpretation, we rely on plain language in the first instance, but always look to legislative history in order to determine whether there is a clear indication of contrary intent.") (Reinhardt, specially concurring); *see also National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974) ("[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent.").

> Today, we are addressing one portion of that in trying to stop gun manufacturers from being sued erroneously. There are many areas in which you can sue a gun manufacturer. If the gun malfunctioned, then that kind of lawsuit, of course, would be allowed. They would also be allowed where *there is a knowing violation of a firearms law*, when the violation is the proximate cause of the harm for which the relief is sought.

151 Cong. Rec. S9217-02 (statement of Sen. Hutchison) (emphasis added).

> I know it is hard to believe, but that is the theory of these lawsuits. That theory is you sold a gun lawfully, OK. You followed the complex Federal regulations that have a huge host of requirements. You followed the State legislature's requirements, often very complex, also, to the T, and it comes in the hand of a criminal, and they use it for a crime. Now the manufacturer and the seller are liable. What kind of law is that? We do not need that. These lawsuits are happening, and so all this would say is that those kinds of lawsuits cannot be brought.

151 Cong. Rec. S8908-01 (statement of Sen. Sessions).[21]

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[21] The legislative history contains numerous other examples of quotes that provide an understanding of the legislature's intent to have the predicate exception apply only to violations of firearms-specific laws. *See, e.g.*, 151 Cong. Rec. S9217-02 (statement of Sen. Craig reading *Wall Street Journal* article into record) ("The gun makers aren't seeking immunity from all liability; they would continue to face civil suits for defective products or for violating sales regulations.") (quoting "Gun Liability Control," *Wall Street Journal*, July 25, 2005); 151 Cong. Rec. S8908-01 (statement of Sen. Sessions) ("It is simply wrong . . . to allow those manufacturers who comply with the many rules we have set forth—they comply with those

Indeed, even Senator Jack Reed, the bill's most vocal opponent in the Senate, understood that the predicate exception applied only to statutes specifically regulating guns sales and marketing:

> Here is what essentially this legislation does in lots of respects. It says we are disregarding those instances where one has a duty to someone under the civil law. We will let them proceed with their suit if there is a criminal violation or a statutory violation, a violation of regulations, but for the vast number of other responsibilities we owe to each other, that are defined for the civil law, one will not have the opportunity to go to court.

151 Cong. Rec. S9217-02 (statement of Sen. Reed); *see also* 151 Cong. Rec. S9217-02 (statement of Sen. DeWine) ("If this bill were to become law, a plaintiff would not only have to demonstrate that a gun dealer acted negligently, but also that the gun dealer broke the law—broke the criminal law. In other words, the plaintiff would—with one lone exception that has already been talked

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rules, to be sued for intervening criminal acts . . . If they knew, if they had reason to know, if they were negligent in going through the requirements of the law or failed to do the requirements of the law, they can be sued. But if they do it right and it goes into the hands of someone who uses it for a criminal purpose, the manufacturer of that gun absolutely should not be subject to a lawsuit."); 151 Cong. Rec. S8908-01 (statement of Sen. Sessions) ("The problem we are dealing with is the possibility that courts will create legal liability on a manufacturer of a lawful product, a lawful product that has been sold according to the strict requirements of Federal and State law, and that they somehow become an insurer of everything wrong that occurs as a result of the utilization of that lawful product."); 151 Cong. Rec. S9217-02 (statement of Sen. Graham) ("So this bill does not allow someone to sell a gun without following the procedures that we have set out to sell a gun.").

about on the floor a few moments ago—have to prove the gun dealer violated a statute or is guilty of a crime."). In short, the bill's proponents and its opponents labored under the same understanding of the predicate exception. Both understood that it applied only to violations of statutes specifically applicable to the sale or marketing of firearms.[22]

Second, the resounding defeat of amendments seeking to expand the bill's exceptions further illustrates that Congress did not intend for the predicate exception to apply to laws of general applicability. For example, an amendment proposed by Senator Carl Levin would have added an exception to the definition of a qualified civil liability action for cases in which a firearm manufacturer's or dealer's gross negligence or reckless conduct was a proximate cause of death or injury. 151 Cong. Rec. S9087-01 (statement of Sen. Levin). The proponents of

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[22] Likewise, in referring to the predicate exception, senators on both sides of the issue characterized it as applying to knowing violations of a statute "related to" the sale or marketing of a firearm. *See* 151 Cong. Rec. S8927-01 (statement of Sen. Reed) ("Knowing violation of the law exception: This exception applies where a gun seller or manufacturer knowingly violates a State or Federal statute when it makes a sale that leads to an injury. Here, Kahr Arms did not violate statutes related to the sale or manufacturing of a gun. Rather, Kahr's employees surreptitiously took the guns out.") (emphasis added); 151 Cong. Rec. S9246-02 (statement of Sen. Santorum) ("This bill provides carefully tailored protections that continue to allow legitimate suits based on knowing violations of Federal or State law related to gun sales, or on traditional grounds including negligent entrustment, such as sales to a child or an obviously intoxicated person or breach of contract.") (emphasis added). While by no means dispositive of congressional intent, these statements nevertheless add to the existing evidence regarding the legislative intent behind the predicate exception.

PLCAA attacked this amendment, primarily because they believed that it would effectively "gut" the Act:

> I rise in strong support of the Protection of Lawful Commerce in Arms Act and in opposition to these amendments that will be offered this afternoon, all of which are designed to gut the underlying legislation.

151 Cong. Rec. S9374-01 (statement of Sen. Thune).

> Mr. President, I rise in opposition to the amendment that has been proposed by the Senator from Michigan and cosponsored by the Senator from Minnesota. While this amendment appears to be innocuous, it would actually gut the very underlying purpose of this legislation.

151 Cong. Rec. 9217-01 (statement of Sen. Cornyn); *see also* 151 Cong. Rec. S9217-02 (statement of Sen. Kyl) (stating that Levin Amendment would "totally undercut[ ] the purpose" of the bill).

Likewise, another amendment proposed by Senator Reed seeking to ensure the survival of the traditional negligence cause of action against firearms manufactures and dealers generated the same attacks from the bill's proponents:[23]

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[23] "My amendment has an overarching purpose, to preserve the right of an individual to sue for negligence when they have been harmed and when that negligence can be fairly attributed to a gun manufacturer, gun dealer, or a gun trade association. It does not depart from the principles of the law. In fact, it embraces the fundamental principle of the law which says if someone owes you a duty of care and violates that duty and you have been harmed, you have a right to go into court." 151 Cong. Rec. S9374-01 (statement of Sen. Reed).

> This is a complete substitute for the bill. In effect, it guts the bill. It does exactly the opposite of what the bill is intended to do, and that is to stop abusive predatory lawsuits against law-abiding businesses for damages caused by the criminal misuse of their products by others.

151 Cong. Rec. S9374-01 (statement of Sen. Hutchison).

> The Reed substitute, as the Senator from Texas has said, simply guts it, changes the whole intent of the bill very dramatically.

151 Cong. Rec. S9374-01 (statement of Sen. Craig).

While these amendments did not speak directly to the predicate exception, their resounding defeats further illustrate that the proponents of the PLCAA sought to limit the reach of the predicate exception. Otherwise, the PLCAA's proponents would have had no reason to oppose either amendment. Indeed, the Levin Amendment in particular, which spoke only to civil causes of action for gross negligence and recklessness, would have created a much narrower exception than the one that would result if the predicate exception embraced violations of any State or Federal statute capable of being applied to the sale and marketing of firearms. Yet, the Levin Amendment, as well as the broader Reed Amendment, failed to gain support in the Senate and, in fact, generated vocal opposition. Their defeat, therefore, leads to the conclusion that the PLCAA's supporters likewise did not intend for the predicate exception to apply to even farther-reaching statutory causes of action with no specific application to the firearms industry.

Third, the legislative history provides additional evidence regarding the predicate exception's applicability to cases such as this one. Indeed, during debate on this bill,

the respective sponsors of the bill in both the Senate and in the House of Representatives cited this very case as a prime example of the type of lawsuit the bill was designed to prevent. *See*, 51 Cong. Rec. E2162-03 (statement of Rep. Stearns); 151 Cong. Rec. S9374-01 (statement of Sen. Craig). Indeed, Representative Stearns, the bill's sponsor in the House, characterized this case as an extreme example of the problem that the Act was meant to address:

> I want the Congressional Record to clearly reflect some specific examples of the type of predatory lawsuits this bill will immediately stop.
>
> . . .
>
> Another example is the case of *Ileto v. Glock*, in Federal court in Los Angeles, CA, against a manufacturer and a distributor who are being sued over a criminal shooting. The facts, if you can believe it, are that the manufacturer, Glock, sold the pistol later criminally misused, to a Washington State police department and the distributor being sued never owned, sold, nor possessed the firearm that was criminally misused.

151 Cong. Rec. E2162-03 (statement of the Rep. Stearns). These sentiments echoed those of Senator Craig, the bill's sponsor in the Senate:

> I want to give some examples of exactly the type of predatory lawsuits this bill will eliminate.
>
> . . .
>
> Another example of a lawsuit captured by this bill is the case of *Ileto v. Glock*, pending in Federal court in Los Angeles, CA, against Glock and a distributor, RSR. The United States Ninth Circuit Court of Appeals said Glock and RSR could be sued for a

> criminal shooting when Glock sold the pistol to a Washington State police department and the distributor RSR never owned, nor sold, nor possessed the firearm.

151 Cong. Rec. E2162-03 (statement of Sen. Craig).[24]

The Court, of course, is mindful that "the remarks of a legislator, even those of the sponsoring legislator, will not override the plain meaning of a statute." *United States v. Tabacca*, 924 F.2d 906, 911 (9th Cir. 1991) (citing *Weinberger v. Rossi*, 456 U.S. 25, 35 n. 15, 102 S. Ct. 1510, 71 L. Ed. 2d 715 (1982) ("The contemporaneous remarks of a sponsor of legislation are not controlling in analyzing legislative history.")). However, where the sponsor's remarks comport with the statutory language and other legislative history, those remarks are entitled to consideration, as a bill's sponsor is deemed to be "particularly well informed about its purpose, meaning, and in-tended effect." Singer, *supra* § 48:15. Here, the statements of Representative Stearns and Senator Craig dovetail with both the statutory language and the legislative history. And while their remarks are not controlling, they nevertheless shed light on the legislative intent on both the use of the word "applicable" in the predicate exception and whether the predicate exception was meant to apply to cases such as this one.

Although Congress did not intend to immunize firearms manufacturers and dealers from their own miscon-

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[24] Although the district court in *Beretta* did not mention this portion of the legislative history, Representative Stearns and Senator Craig also listed the *Beretta* case as another prime example of the type of lawsuit that the PLCAA would extinguish. 151 Cong. Rec. E2162-03 (statement of the Rep. Stearns); 151 Cong. Rec. E2162-03 (statement of Sen. Craig).

duct,[25] Congress nevertheless intended to immunize them from liability when they complied with State and Federal laws specifically governing the sale and marketing of firearms. Accordingly, Congress must also have intended to immunize them from traditional causes of action that would have imposed liability even where the manufacturers or dealers followed those laws, regardless of whether those causes of action were grounded in common law or statute or both. Indeed, the vocal opposition to, and the resounding defeats of, both the

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[25] *See, e.g.*, 151 Cong. Rec. S9059-04 (statement of Sen. Craig) ("It is not a gun industry immunity bill because it does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct. This bill gives specific examples of lawsuits not prohibited-product liability, negligence or negligent entrustment, breach of contract, lawsuits based on violations of States and Federal law."); *id.* ("This legislation prohibits one narrow category of lawsuits: suits against the firearms industry for damages resulting from the criminal or unlawful misuse of a firearm or ammunition by a third party. It is very important for everybody to understand that it is that and nothing more."); 151 Cong. Rec. 9059-04 (statement of Sen. Hatch) ("This bill is not a license for the gun industry to act irresponsibly. If a manufacturer or seller does not operate entirely within Federal and State law, it is not entitled to the protection of this legislation. I should also note that this bill carefully preserves the right of individuals to have their day in court with civil liability actions where negligence is truly an issue, or where there were knowing violations of laws on gun sales."); 151 Cong. Rec. S8908-01 (statement of Sen. Sessions) ("Manufacturers and sellers are still responsible for their own negligent or criminal conduct and must operate entirely within the complex State and Federal laws. Therefore, plaintiffs are not prevented from having a day in court. Plaintiffs can go to court if the gun dealers do not follow the law, if they negligently sell the gun, if they produce a product that is improper or they sell to someone they know should not be sold to or did not follow steps to determine whether the individual was properly subject to buying a gun.").

Levin Amendment and the Reed Amendment exemplify this fact.

In sum, the legislative history strongly suggests that Congress did not intend for the predicate exception to apply to violations of State and Federal statutes that are merely capable of being applied to the sale and marketing of firearms. Instead, it illustrates that the predicate exception was meant to apply only to violations of State and Federal statutes specifically applicable to the sale and marketing of firearms. This interpretation not only comports with the PLCAA's legislative history, but also with its stated findings and purposes, as well as with the overall statutory scheme. *See supra.*

b. **Canons of Statutory Interpretation**

In addition to the evidence cited above, traditional canons of statutory construction also buttress the Court's interpretation of the meaning of "applicable" in the predicate exception. First, the doctrine of ejusdem generis dictates that "applicable" was intended to mean "specifically applicable." [26] As mentioned earlier, the doctrine of ejusdem generis applies when general words in a statute are followed by specific words. The doctrine limits the meaning of the general words to items that are similar to those that are thereafter specifically enumerated. Singer, *supra* § 47:17; *see Molloy v. Metro Transp. Auth.*, 94 F.3d 808, 811-12 (2d Cir. 1996) (construing general term followed by "including, but not limited to," as meaning only things similar in nature to the specific items in the nonexclusive list of examples that followed).

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[26] The Court did not apply this doctrine earlier because the Court had not yet concluded that the word "applicable" was unclear. But having now found that "applicable" is, in fact, unclear, it is appropriate to apply this doctrine.

As applied to the predicate exception, the doctrine of ejusdem generis limits the scope of the statute's general reference to State and Federal statutes "applicable" to the sale or marketing of firearms to those thereafter specified in the examples illustrating when the predicate exception would apply. Both examples involve statutes specifically applicable to the sale or marketing of firearms. Accordingly, the State and Federal statutes to which the general part of the predicate exception refers are likewise limited to statutes specifically applicable to the sale or marketing of firearms.

Second, as a general rule, exceptions in a statute should be read narrowly. *Korherr v. Bumb*, 262 F.2d 157, 162 (9th Cir. 1958) ("[W]here words of exception are used, they are to be strictly construed to limit the exception.") (citing *Piedmont & Northern R. Co. v. Interstate Commerce Commission*, 286 U.S. 299, 52 S. Ct. 541, 76 L.Ed. 1115 (1932)); *E.E.O.C. v. Kamehameha Schools/ Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993) ("We construe the statutory exemptions narrowly."). Construing the predicate exception to apply to a violation of any State or Federal statute capable of being applied to the firearms industry would turn this canon on its head. Indeed, as discussed earlier, this interpretation would create such a large exception that the immunity that the PLCAA provides would be largely eviscerated. Accordingly, like the doctrine of ejusdem generis, the general rule favoring strict interpretation of exceptions likewise counsels in favor of limiting the predicate exception to violations of statutes specifically applicable to the sale or marketing of firearms.

4. **Plaintiffs' Causes of Action Are Based Exclusively on State Statutes That Are Only Gen-**

erally Applicable to the Sale and Marketing of Firearms.

The Court now turns to whether Plaintiffs' causes of action fall within the predicate exception. Plaintiffs rely on three State statutes that allegedly bring their causes of action within the predicate exception. Specifically, Plaintiffs rely on the following statutes: (1) California Civil Code section 1714(a),[27] which establishes a general duty of care by which all in California must abide; (2) California Civil Code section 3479,[28] which embodies

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[27] Section 1714(a), as effective when this action was filed, stated:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

Cal. Civil Code § 1714(a) (2001). Section 1714(a) was amended in 2002 to note that the firearms industry was not exempt from the general duty imposed by section 1714(a). As amended, section 1714(a) reads, in pertinent part, as follows:

> Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or per-son, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section.

Cal. Civil Code § 1714(a) (2004).

[28] Section 3479 states:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use,

California's definition of a nuisance; and (3) California Civil Code section 3480,[29] which sets forth what constitutes a public nuisance.

None of these statutory provisions, however, triggers the predicate exception. On the contrary, each of these statutory provisions apply only generally: they are not statutes specifically applicable to the sale or marketing of firearms. As such, under the Court's interpretation of the predicate exception, none of them constitutes a statute "applicable" to the sale or marketing of firearms. Moreover, the 2002 amendment to section 1714(a) does not effect the Court's conclusion. *See infra* at n. 27. Even assuming that this amendment applied to this action, which predated the amendment, the amendment nevertheless does not change the character of section 1714(a).[30] It was and still is a statute of general appli-

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in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Cal. Civil Code § 3479.

[29] Section 3480 states:

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Cal. Civil Code § 3480.

[30] Defendants contend that the 2002 amendment to section 1714(a) should not apply to this case because the case predates the amendment. Under California law, as under federal law, statutes do not operate retrospectively unless the legislature plainly intended them to do so. *W. Sec. Bank v. Super. Ct.*, 15 Cal. 4th 232, 243, 62 Cal. Rptr. 2d 243, 933 P.2d 507 (1997) (*citing Evangelatos v. Super. Ct.*, 44 Cal.3d 1188, 1207-08, 246 Cal. Rptr. 629, 753 P.2d 585 (1988)). "The presumption against retroactive legislation is 'deeply rooted in our jurisprudence' because 'individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'"

cability. Indeed, to the extent that the amended version of section 1714(a) mentions the firearms industry, it does so only to show that the duty of care described in the statute was meant to apply to everyone in California, even the firearms industry. As such, it is no more specifically applicable to sale or marketing of firearms than the general definitions of nuisance and public nuisance on which Plaintiffs also rely. Accordingly, even as amended, section 1714(a) does not trigger the predicate exception.

Because Plaintiffs cite no other statutory provision to maintain any of their causes of action, the PLCAA requires the immediate dismissal of this action.

B. The PLCAA is Constitutional.

Plaintiffs challenge the constitutionality of the PLCAA, at least as applied to them, on several grounds, most of which hinge upon Plaintiffs' assertion that their causes of action against Defendants constitute vested property rights.[31] For example, Plaintiffs claim that the

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Valles v. Ivy Hill Corp., 410 F.3d 1071, 1079 (9th Cir. 2005) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). "However, 'a statute that merely clarifies, rather than changes, existing law' may be 'applied to transactions predating its enactment.'" *Valles*, 410 F.3d at 1079 (quoting *W. Sec. Bank*, 15 Cal. 4th at 243, 62 Cal. Rptr. 2d 243, 933 P.2d 507) (some citations omitted). Here, section 1714(a) arguably only clarifies existing California law. However, the Court need not resolve this issue because, as discussed above, the amended version of section 1714(a) does not implicate the predicate exception.

[31] *See, e.g.*, Opposition at 25 ("[U]nder controlling state law, these Plaintiffs' personal injury and wrongful death claims are vested property rights, and thus they are entitled to the procedural and substantive protections of the Due Process Clause. Prior to the enactment of the Act, state law also entitled Plaintiffs to access to the courts and a right to a jury trial on disputed factual issues, both of which were attributes of their vested state law claims"); *id.* at 28

PLCAA effectuates a taking of their property without compensation. Additionally, they assert that the retroactive provision of the PLCAA denies them their rights to due process. Furthermore, they claim that the PLCAA amounts to a bill of attainder. Finally, they contend that the PLCAA violates their rights to equal protection.

As explained below, none of these arguments has merit. Rather, as applied to Plaintiffs, the PLCAA passes constitutional muster. The Court addresses each of Plaintiffs' constitutional challenges in turn below.

1. **Vested Property Right**

As the majority of Plaintiffs' constitutional challenges rise or fall depending on whether Plaintiffs have a vested property interest in their causes of action, the Court turns first to this question. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (stating that threshold question in due process claim is whether plaintiff was deprived of a protected interest and, if so, what process was due).

Plaintiffs contend that the express retroactivity of the PLCAA amounts to an unconstitutional taking of their property interests in this lawsuit. Specifically, they assert that their causes of action against Glock and RSR constitute vested property interests that cannot be taken without just compensation or due process of law.

A cause of action is a "species of property." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). While recognizing this principle, the Ninth Circuit has nevertheless held that a

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("Moreover, as an attribute of Plaintiffs' vested property rights, prior to the Act they were entitled to access to the courts and to a jury trial on disputed factual issues. The Act severely impacts these fundamental rights.").

party's property right in any cause of action does not vest "'until a final unreviewable judgment is obtained.'" *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 989 (9th Cir. 1987) (quoting *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986)); *Grimesy v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989).

Additionally, every circuit court to have addressed the issue has likewise concluded that no vested property right exists in a cause of action unless the plaintiff has obtained a final, unreviewable judgment. *See, e.g., Hammond*, 786 F.2d at 12 ("Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort.") (cited with approval by the Ninth Circuit in *Atmospheric Testing*, 820 F.2d at 989); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("The fact that the statute is retroactive does not make it unconstitutional as a legal claim affords no definite or enforcible [sic] property right until reduced to final judgment."); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (same) (quoting *Sowell*, 888 F.2d at 805); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369, 1373 (11th Cir. 1988) (finding no Fourteenth Amendment violation in the retroactive application of a twelve year statute of repose that barred the plaintiffs' cause of action); *Ducharme v. Merrill-Nat'l Laboratories*, 574 F.2d 1307, 1309 (5th Cir. 1978) ("[A] plaintiff has no vested right in any tort claim for damages under state law.")

Here, Plaintiffs have no vested property right in their causes of action because they have never obtained a final, unreviewable judgment in their favor. Accordingly, applying the PLCAA's retroactive provision to Plaintiffs'

causes of action does not constitute a taking under the Fifth Amendment.

2. Procedural Due Process

Plaintiffs also contend that the retroactive provision of the statute violates their right to due process because it effectively requires dismissal of their action without first affording them a meaningful opportunity to be heard. Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Generally, due process requires, at the least, some type of notice and an opportunity to be heard. *Foss v. National Marine Fisheries Serv.*, 161 F.3d 584, 590 (9th Cir. 1998).

Although a cause of action is a "species of a protected property," it nevertheless differs substantially from real or personal property or vested intangible rights. *Atmospheric Testing*, 820 F.2d at 989. "It is inchoate and affords no definite or enforceable property right until reduced to final judgment." *Id.* As such, it affords the holder fewer rights than the traditional bundle of rights associated with the ownership of property. *Id.* "Instead, it represents a right to assert a claim for compensation or some other form of judicial relief. Its value is contingent on successful prosecution to judgment. Thus, to the extent it is entitled to due process protection, that protection focuses on assuring access to fair procedures for its prosecution. The notion of due process relevant to causes of action is that deprivation . . . by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*

The PLCAA affords Plaintiffs all process due to them considering the interest they have in their causes of action. Contrary to Plaintiffs' arguments, the PLCAA

does not require the dismissal of any pending case against a firearms manufacturer or dealer without any judicial oversight. Rather, it requires only that cases fitting the Act's definition of a "qualified civil liability action" be dismissed. And before any case fitting that definition is dismissed, a plaintiff receives notice of the possibility of dismissal and an opportunity to argue that the given case falls within one of the exceptions to the definition of a "qualified civil liability action." Indeed, as the *Beretta* Court pointed out, the Act "does not control courts' determinations" of whether one of the Act's exceptions to dismissal applies. *Beretta*, 401 F. Supp. 2d at 293. Instead, this determination rests in the sole province of the courts. *See id.* Finally, before any dismissal occurs, a plaintiff can challenge the constitutionality of the Act, as Plaintiffs have done in this case. Thus, Plaintiffs' contention that the Act requires "immediate dismissal of [their] lawsuit without a meaningful opportunity" to be heard is meritless.[32]

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[32] Indeed, the Court devoted a very considerable amount of time and energy to determining whether, in fact, this case fell within the predicate exception to the PLCAA's definition of a "qualified civil immunity action." The Court determined that it did not fall within that exception only after carefully considering and weighing the arguments of counsel, researching and analyzing relevant case law, and reviewing every piece of legislative history related to the PLCAA. Additionally, the Court spent an equal amount of time—if not more—addressing the merits of Plaintiffs' many and oftentimes confusing constitutional arguments. Thus, the Court is somewhat puzzled by Plaintiffs' assertion that they have received "no meaningful opportunity" to be heard. The Court treats all the matters that come before it—particularly those challenging legislation of national significance—very seriously.

3. **Retroactivity**

As a general rule, courts hold a strong presumption against retroactive legislation. *Aragon-Ayon v. I.N.S.*, 206 F.3d 847, 851 (9th Cir. 2000) (citing *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997)). "However, this presumption is applied only if Congress has not 'clearly manifested its intent to the contrary.'" Id. (quoting *Hughes Aircraft Co.*, 520 U.S. at 946, 117 S. Ct. 1871). If, on the other hand, Congress clearly manifests its intent for the given legislation to apply retroactively, the Court limits its inquiry to whether the given legislation meets the requirements of due process. See *Atmospheric Testing*, 820 F.2d at 991.

To meet the requirements of due process, "the retroactive application of [the] statute must be supported by a legitimate legislative purpose furthered by rational means."[33] *Id.*; *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 678 (9th Cir. 2002) (stating

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[33] Plaintiffs urge the Court to apply a heightened standard of review because the PLCAA affects a fundamental right-namely, their Seventh Amendment right to access the courts and to jury trial. Plaintiffs, however, premise this argument on the existence of a vested property right in their causes of ac-tion against Defendants. See Opposition at 25 ("Prior to the enactment of the Act, state law also entitled Plaintiffs to access to the courts and a right to a jury trial on disputed factual issues, both of which were attributes of their vested state law claims."); id. ("Moreover, as an attribute of Plaintiffs' vested property rights, prior to the Act they were entitled to access to the courts and to a jury trial on disputed factual issues.") (em-phasis added). But as explained in detail above, Plaintiffs have no vested property right in their causes of action. Accordingly, the Court declines to apply a heightened standard of review to Plaintiffs' challenge to the retroactive provision of the PLCAA. Likewise, the Court declines to apply a heightened standard of review to Plaintiffs' equal protection challenges to the PLCAA.

that analysis of legislation intended to apply retroactively requires court to determine "whether the statute is justified by a rational legislative purpose"); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (explaining that legislation comports with the Due Process Clause if "the retroactive application of the legislation is itself justified by a rational legislative purpose"). The party challenging the retroactive application of the statute bears the burden of establishing that "'the legislature has acted in a arbitrary and irrational way.'" *Atmospheric Testing*, 820 F.2d at 991-92 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976)).

Here, the PLCAA's retroactive provision comports with due process. First, Congress unequivocally manifested its intent for the PLCAA to apply retroactively. Indeed, the Act requires the dismissal of any "qualified" action "pending" as of the date of the Act's enactment. 15 U.S.C. § 7902(b). As this necessarily requires the dismissal of actions filed before the statute's enactment, Congress could not have made its intent for the statute to apply retroactively any clearer.

Second, the retroactive application of the Act furthers a legitimate legislative purpose. Among other things, the Act seeks to prevent a perceived undue burden on interstate commerce caused by what Congress has determined to be "predatory" lawsuits against the firearms industry. *See* 15 U.S.C. § 7901(b)(4); *see also Beretta*, 401 F. Supp. 2d at 295 (finding that Congress's desire to insulate firearms manufacturers and dealers from threat of qualified civil liability actions provided rational basis for enacting the PLCAA). The legislative history contains repeated references about the dire

consequences of these "predatory" lawsuits.[34] Although one may disagree with Congress's predictions, one cannot credibly argue that the Act's retroactive provision does not further a legitimate legislative purpose. See Beretta, 401 F. Supp. 2d at 295 (rejecting equal protection challenge to PLCAA and stating that "'rational basis does not allow courts to judge wisdom or desirability of legislative policy determinations'") (quoting *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). On the contrary, preventing undue burdens on interstate commerce falls squarely within Congress's authority under the commerce clause. *See Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 2205, 162 L. Ed. 2d 1 (2005) ("Congress has the power to regulate activities that substantially affect interstate commerce."). Moreover, as the district court in *Beretta*

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[34] *See, e.g.*, 151 Cong. Rec. S8908-01 (statement of Sen. Sessions) ("These industries have great reason to be insecure. Everyone knows how detrimental runaway verdicts can be and one major verdict can bankrupt an industry. Huge costs arise from simply defending an unjust lawsuit. Indeed, such lawsuits, even if lacking any merit and ultimately unsuccessful, can deplete an industry's resources and depress stock prices."); 151 Cong. Rec. S9059-04 (statement of Sen. Coburn) ("The danger that these lawsuits could destroy the gun industry is especially threatening because our national security and our civil liberties are at stake."); 151 Cong. Rec. S8927-01 (statement of Sen. Hatch) ("Now, this legislation is a necessary response to the growing problem of junk lawsuits filed, no doubt, in part with the intention of driving the firearms industry out of business."); 151 Cong. Rec. H8881-01 (statements of Rep. Gingrey) ("The passage of this legislation is time-sensitive. Every day without this legislation puts more stress on firearm manufacturers, their customers, and their employees. Indeed, some lawsuits are motivated by ideology and a distaste for the firearm industry and guns in general. They will simply keep suing until either the firearm companies are out of business or the guns are too expensive to purchase.").

has already concluded, "there is a rational basis for Congress' determination that the Act was necessary to protect [the firearms] industry." *Beretta*, 401 F. Supp. 2d at 287.

In short, the retroactive provision of the PLCAA as applied to Plaintiffs comports with the Due Process Clause of the Fifth Amendment.

4. Bill of Attainder

Plaintiffs next assert that the PLCAA amounts to a bill of attainder, in that it targets a small, readily identifiable number of parties, each of whom has an action pending against members of the firearms industry. Plaintiffs presumably believe that Congress enacted the PLCAA to punish those parties for prosecuting these actions. Indeed, Plaintiffs note that the congressional record shows that some of the legislators even named the parties they sought to target with the PLCAA. As such, Plaintiffs conclude that the PLCAA violates the constitutional prohibition on bill of attainders.

"[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *U.S. v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir. 1999) (internal quotations and citations omit-ted). "Three requirements must be met to establish a violation of the bill of attainder clause: '[S]pecification of the affected persons, punishment, and lack of a judicial trial.'" Id. (quoting *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 847, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984)).

In analyzing the "punishment" element, a court looks to three factors to determine whether the challenged act

imposes a "punishment" for bill of attainder purposes. First, the court determines whether the challenged legislative act "falls within the historical meaning of legislative punishment." *Nixon v. Administrator of General Services*, 433 U.S. 425, 475, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). Second, the court determines whether "the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes." *Id.* Third, the court determines whether the legislative record demonstrates a "Congressional intent to punish." *Id.* at 478, 97 S. Ct. 2777.

Here, the PLCAA is not a bill of attainder because no evidence suggests that its purpose is to punish. First, the Act does not fall within the historical meaning of legislative punishment. Although confiscation of property can establish the requisite "punishment," Plaintiffs had no vested property interest in their lawsuit. *See supra*. Second, the PLCAA furthers only "non-punitive legislative purposes"—namely, preventing undue burdens to interstate commerce by protecting the firearms industry from the threat of bankruptcy. Third, the legislative record suggests no Congressional intent to punish anyone, let alone Plaintiffs specifically. Instead, the legislative intent evidences an intent to shield firearms manufacturers and dealers who legally make and sell firearms from liability for injuries caused by a third party using their products. As such, the PLCAA is not a bill of attainder.

5. **Equal Protection**

Finally, Plaintiffs claim that the PLCAA violates their rights to equal protection under the Fifth Amendment, although Plaintiffs never specifically articulate the alleged violation. Indeed, Plaintiffs never explain how

the Act treats them differently from any other group of people, except perhaps that it requires the dismissal of Plaintiffs' pending action, but only bars future qualified actions. If this serves as the basis of Plaintiffs' equal protection claim, it fails for the reasons explained below.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Although the Fifth Amendment does not contain an equal protection clause, the Due Process Clause of the Fifth Amendment embodies an equal protection component that applies to the federal government. *United States v. Sperry Corp.*, 493 U.S. 52, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989) (discussing "the equal protection component of the Due Process Clause" in reviewing the constitutionality of a federal statute).

The Court applies the deferential rational basis standard of review to the PLCAA because Plaintiffs have failed to identify either a fundamental right or a suspect class affected by the PLCAA's application. *See supra* at n. 33. Under the rational basis standard, the Court must engage in a two-tiered inquiry. First, it must determine whether the challenged law has a legitimate purpose. See *Jackson Water Works, Inc. v. Public Util., Comm'n* of Cal., 793 F.2d 1090, 1094 (9th Cir. 1986). Second, the Court must decide whether the challenged law promotes that purpose. *Id.* In this regard, the challenged law will be upheld so long as there is a rational relationship between the ends of the law and the means used to achieve those ends. *Aleman v. Glickman, 217 F.3d 1191, 1200*

(9th Cir. 2000). Accordingly, the challenged law "must be upheld if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." *Taylor v. Rancho Santa Barbara*, 206 F.3d 932, 935 (9th Cir. 2000). Moreover, in making this determination, the Court does not second-guess Congress's motivations. *Besinga v. United States*, 14 F.3d 1356, 1362 (9th Cir. 1994).

Here, to the extent that the Act distinguishes between Plaintiffs and those who do not have a claim pending, it nevertheless does not violate Plaintiffs' rights to equal protection. First, as explained above regarding Plaintiffs' challenge to the Act's retroactivity provision, the PLCAA serves a legitimate purpose. Specifically, it seeks to, among other things, eliminate a perceived undue burden on interstate commerce caused by certain lawsuits threatening the economic viability of the firearms industry. *See Beretta*, 401 F. Supp. 2d at 295 (rejecting equal protection challenge to PLCAA and noting that "Congress made it clear that it thought that nationwide commerce in firearms was particularly imperiled by the threat of qualified civil actions"). Preventing undue burdens on interstate commerce is a legitimate purpose, as is protecting the firearms industry from financial ruin.

Second, the provision of the PLCAA requiring the immediate dismissal of all pending qualified civil liability actions is rationally related to the purpose behind the law. One of the stated purposes of the PLCAA is to protect the firearms industry from lawsuits seeking to hold the industry responsible for the acts of others. *See* 15 U.S.C. § 7901(b)(1).[35] This purpose is furthered by

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[35] Section 7901(b)(1) states:

immunizing firearms manufacturers and dealers from qualified civil liability actions and, as such, provides a rational basis between the goals of the Act and the means used to achieve those goals.[36]

CONCLUSION

For the reasons stated above, Defendants' Motion for Judgment on the Pleadings is GRANTED. Accordingly, the Court DISMISSES this matter as to Defendants Glock and RSR with prejudice.

> The purposes of this chapter are . . . to prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.
>
> 15 U.S.C. § 7901(b)(1).

[36] It is not the Court's role to consider the wisdom of the legislature's decision to grant this limited immunity to the firearms industry. Instead, the Court has confined its analysis to whether Congress acted within its constitutional authority and whether the resulting legislation passes constitutional muster. The Court answers both questions in the affirmative

APPENDIX C
IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-56197

LILIAN S. ILETO, AN INDIVIDUAL AND MOTHER TO JOSEPH S. ILETO, DECEASED; JOSHUA STEPAKOFF, A MINOR, BY HIS PARENTS LOREN LIEB AND ALAN B. STEPAKOFF; MINDY GALE FINKELSTEIN, A MINOR, BY HER PARENTS DAVID AND DONNA FINKELSTEIN; BENJAMIN KADISH, A MINOR, BY HIS PARENTS ELEANOR AND CHARLES KADISH; NATHAN LAWRENCE POWERS, A MINOR, BY HIS PARENTS GAIL AND JOHN MICHAEL POWERS, FOR HIMSELF AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

GLOCK, INC., A GEORGIA CORPORATION; CHINA NORTH INDUSTRIES CORP., A CHINESE ENTITY AKA NORINCO; DAVIS INDUSTRIES, A CALIFORNIA CORPORATION; REPUBLIC ARMS INC., A CALIFORNIA CORPORATION; JIMMY L. DAVIS, AN INDIVIDUAL; BUSHMASTER FIREARMS, A MAINE CORPORATION; RSR MANAGEMENT CORPORATION; AND RSR WHOLESALE GUNS SEATTLE INC.,

Defendants-Appellees,

AND

MAADI, AN EGYPTIAN BUSINESS ENTITY; IMBEL, A BRAZILIAN BUSINESS ENTITY; THE LOANER PAWNSHOP TOO, A WASHINGTON CORPORATION; DAVID MCGEE, AN INDIVIDUAL; GLOCK GMBH, AN AUSTRIAN BUSINESS ENTITY,

Defendants.

Argued and Submitted June 3, 2003
Filed November 20, 2003

Before HALL, THOMAS, and PAEZ, Circuit Judges.

Opinion by Judge PAEZ. Dissent by Judge CYNTHIA HOLCOMB HALL.

OPINION

PAEZ, Circuit Judge.

On August 10, 1999, Buford Furrow ("Furrow") shot and injured three young children, one teenager, and one adult at the Jewish Community Center ("JCC") in Granada Hills, California. Furrow fled the JCC with his weapons and, later that day, shot and killed Joseph Ileto ("Ileto"), a United States Postal worker who was delivering mail in Chatsworth, California.

Ileto's sole surviving dependent parent and three of the children who were shot at the JCC filed a complaint in the Los Angeles Superior Court against multiple defendants involved in the manufacture, marketing, and distribution of various firearms found in Furrow's possession. The case was removed to federal district court, where the plaintiffs asserted negligence and public nuisance claims against several gun manufacturers, distributors, and dealers. These defendants filed motions to dismiss under Fed. R. Civ. P. 12(b)(6), and all motions were granted. Plaintiffs appeal the dismissal of their public nuisance and state law negligence claims.[1]

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[1] When we refer to "plaintiffs," we include Benjamin Kadish, Joshua Stepakoff, Mindy Finkelstein, Nathan Powers, and Lilian Ileto. Lilian Ileto, Joseph Ileto's mother, also asserted survival and

Because the plaintiffs have stated a cognizable claim under California tort law for negligence and public nuisance against the manufacturers and distributor of the guns used in the shootings, we reverse the district court's dismissal against the plaintiffs and in favor of defendants Glock, Inc., China North Industries Corp., RSR Management Corp. and RSR Wholesale Guns Seattle Inc. We affirm the district court's dismissal in favor of all other defendants.[2]

I. Facts And Procedural Background [3]

On August 10, 1999, Furrow approached the North Valley JCC in Granada Hills, California, carrying firearms manufactured, marketed, imported, distributed, and/or sold by the defendants named in this case. When Furrow purchased these guns and at the time of the shooting, federal law prohibited him from possessing, purchasing, or using any firearm.[4] Furrow allegedly had

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wrongful death claims. As we explain below, because those claims incorporate the negligence and nuisance claims, the analysis with respect to these claims applies to Lilian Ileto's survival and wrongful death claims.

[2] Defendants Maadi, an Egyptian business, and Imbel, a Brazilian business, never appeared in the district court. The district court docket does not reflect that these defendants were served with the summons and complaint in this action. These defendants therefore are not parties to this appeal.

[3] Because the district court dismissed the plaintiffs' case pursuant to Rule 12(b)(6) dismissal for failure to state a claim, we must "accept as true all well-pleaded allegations of fact in the complaint and construe them in the light most favorable to the plaintiffs." Thus, this factual recitation is taken from the plaintiffs' First Amended Complaint ("FAC").

[4] Furrow had been committed to a psychiatric hospital in 1998, indicted for a felony in 1998, and convicted of assault in the second degree in 1999 in the state of Washington. Federal law prohibits a person with a mental defect who has been committed to a mental

at least the following guns in his possession: Glock Inc's ("Glock's") model 26, a 9mm handgun; China North Industries Corp's ("Norinco's") model 320, a 9mm short-barreled rifle; Maadi's model RML, a 7.62 caliber automatic rifle; Bushmaster's model XM15 E25, a .223 caliber rifle; two of Imbel's model L1A1, a .308 caliber rifle; and Davis Industries' model D 22, a .22 caliber handgun.

Furrow entered the JCC with this arsenal and proceeded to shoot and injure three young children, one teenager, and one adult with his Glock gun. Two of the young children were plaintiffs Joshua Stepakoff ("Stepakoff"), who was six years old at the time of the shooting, and Benjamin Kadish ("Kadish"), who was five years old at the time of the shooting. Stepakoff was shot twice in the left lower leg and left hip, fracturing a bone. Kadish was shot twice in the buttocks and left leg, fracturing his left femur, severing an artery, and causing major internal injuries. Plaintiff Mindy Finkelstein ("Finkelstein"), a sixteen-year old camp counselor, was shot twice in her right leg. Plaintiff Nathan Powers ("Powers"), a four

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institution and/or convicted of a felony from purchasing a gun. This prohibition is contained in 18 U.S.C. § 922(d), which provides in pertinent part:

> It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—
>
> (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) is a fugitive from justice;
>
> (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
>
> (4) has been adjudicated as a mental defective or has been committed to any mental institution . . .

year-old boy, was not shot, but witnessed and experienced the shootings. The shootings terrified and shocked him, causing him to suffer great mental suffering, anguish, and anxiety as well as severe shock to his nervous system. He suffered severe emotional distress as a result.

Furrow then fled the JCC with the firearms, and came upon Ileto, a United States Postal Service worker, who was delivering mail in Chatsworth, California. Furrow shot and killed Ileto with his Norinco gun. Nine millimeter bullet casings were recovered at both crime scenes. The Norinco and the Glock guns in Furrow's possession were chambered for 9mm ammunition.[5]

In their initial complaint, the plaintiffs alleged five causes of action. Lilian Ileto also asserted two claims against all defendants for survival and wrongful death. The last five claims were brought by all plaintiffs against all defendants[6] for public nuisance, negligence, negligent entrustment, and unfair business practices. The original complaint sought certification of a class, damages, and injunctive relief.

On May 23, 2001, the plaintiffs filed their thirty-seven page FAC, retaining Lilian Ileto's survival and wrongful death claims as well as all plaintiffs' negligence and public nuisance claims, and the claim for damages. Plaintiffs abandoned their class allegations and their requests for injunctive relief, and dropped defendants Loaner Pawnshop and David McGee from the complaint. RSR

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[5] The FAC states that the Norinco, the Glock, and the Davis guns were chambered with 9mm casings. However, in an errata filed after the FAC, plaintiffs noted that only the Glock and the Norinco guns actually were chambered for 9mm ammunition.

[6] Two defendants, Loaner Pawnshop and David McGee, successfully moved for dismissal for lack of personal jurisdiction.

Management Corporation and RSR Wholesale Guns Seattle, Inc. (collectively, "RSR") were named as two of the Doe defendants. Norinco removed the action to federal court pursuant to 28 U.S.C. §§ 1330 and 1603 on the ground that Norinco is an instrumentality of a foreign state.

In the FAC, plaintiffs asserted a number of claims against the manufacturers, distributors, and dealers of the guns Furrow carried with him on the day of the shootings. Defendants moved to dismiss the case, arguing that even if all of the alleged facts were true, the plaintiffs had failed to state a legally cognizable claim; the district court agreed and granted the motions to dismiss. On appeal, the plaintiffs pursue only two of their original claims, the negligence and public nuisance claims. Below, we set forth the core allegations with respect to these claims.

A. Facts Alleged In The Negligence Claim

The first three claims in Count IV include general claims against all defendants, alleging that their "deliberate and reckless marketing strategies caused their firearms to be distributed and obtained by Furrow resulting in injury and death to plaintiffs." Plaintiffs also allege that the defendants intentionally produced more firearms than the legitimate market demands with the intent of marketing their firearms to illegal purchasers who buy guns on the secondary market. The plaintiffs also allege that the defendants breached their legal duty to the plaintiffs "through their knowing, intentional, reckless, and negligent conduct . . . foreseeably and proximately causing] injury, emotional distress, and death to plaintiffs."

Plaintiffs allege that each of the firearms used by Furrow (the one allegedly used at the JCC, the one used

to kill Ileto, and the ones not necessarily fired but carried by Furrow in his arsenal on the day of the shootings)

> were marketed, distributed, imported, promoted, or sold by each of the defendants in the high-risk, crime-facilitating manner and circumstances described herein, including gun shows, 'kitchen table' dealers, pawn shops, multiple sales, straw purchases, faux 'collectors,' and distributors, dealers and purchasers whose ATF crime-trace records or other information defendants knew or should have known identify them as high-risk. Defendants' practices knowingly facilitate easy access to their deadly products by people like Furrow.

With respect to Glock, plaintiffs specifically alleged that Glock targets its firearms to law enforcement first to gain credibility and then uses the enhanced value that comes with law enforcement use to increase gun sales in the civilian market. They contend that Glock guns are safe and appropriate for use by well trained elite offensive police forces, but are not appropriate for civilians or unskilled users. In addition, Glock and its distributors encourage police departments to make trade-ins earlier than necessary or originally planned so that they can sell more firearms to the police and sell the former police guns at a mark-up on the civilian market. Glock knows that by over-saturating the market with guns, the guns will go to the secondary markets that serve illegal purchasers.

The gun that Furrow used to shoot and kill Ileto was purchased originally by a police department in the state of Washington. The plaintiffs allege that Glock and its distributor, RSR Seattle, arranged for the sale of the gun to the police department and its subsequent sale to gun dealers to facilitate the creation of an illegal secondary

gun market. The gun was initially shipped to the Cosmopolis Police Department in Washington State along with another gun of the same model. Within one week, the police department determined that the guns were too small to fit into a large person's hand and decided to exchange the guns for another Glock model. The Cosmopolis Police Department contacted a former Police reserve officer, Don Dineen ("Dineen"), who had a gun store in Cosmopolis, to complete the exchange. Dineen contacted RSR Seattle, a Glock distributor, to request two new Glock guns for a trade with the Cosmopolis Police Department. RSR shipped the two guns to Dineen and agreed that payment did not have to be made for the new guns until Dineen was able to sell the former police guns. In a transaction with the police department, Dineen exchanged the two new Glock guns for the two Glock guns rejected by the Department at no cost to the Department. Dineen then was able to sell one of the former Police Department Glock guns at a reduced price to David Wright, a man who claimed to be a gun collector.

Dineen had introduced Wright to another "gun collector"[7] named Andrew Palmer, knowing that neither Wright nor Palmer had firearms licenses, and therefore that they did not have to obtain background checks on their purchasers. Dineen also knew that Wright and Palmer frequently sold and traded guns at gun shows in Spokane, Washington, which is near Hayden Lake, Idaho, the home of the Aryan Nations and the Neo Nazi

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[7] The Complaint alleges that these "gun collectors" do not actually collect guns for any purpose other than to sell them without having to comply with the firearm registration system and background checks with which gun store owners must comply with when they sell a gun.

group of which Furrow was a member. Indeed, Wright sold the Glock gun to Palmer at a gun show in Spokane, Washington; at this same gun show, it is alleged that Furrow purchased the Glock gun used in the JCC shootings from Palmer.

Plaintiffs alleged that all the defendant gun manufacturers and distributors produce, distribute, and sell more firearms than legal purchasers can buy, and that they all "knowingly participate in and facilitate the secondary market where persons who are illegal purchasers and have injurious intent obtain their firearms." Furthermore, the plaintiffs allege that the defendant manufacturers and distributors "select and develop distribution channels they know regularly provide guns to criminals and underage end users. Defendant manufacturers and distributors have been specifically so informed [by the ATF[8]] in connection with [its] crime-gun trac[ing] efforts[.]" Despite this knowledge and information documenting the path of guns to illegal purchasers, the defendant manufacturers and distributors fail to exercise reasonable care to protect the public from the risks created by the distribution and marketing schemes that create an illegal secondary market. Defendants' contracts with their distributors and dealers, and the defendant distributors' contracts with their dealers do not include provisions to address the risks associated with prohibited purchasers. Defendants gain significant revenue from the illegal secondary gun market and therefore fail to adopt the most basic policies and practices that would help to decrease greatly the number of guns reaching prohibited purchasers.

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[8] The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is a law enforcement agency within the United States Department of Justice.

Plaintiffs further alleged that the defendants create and control the distribution channels that provided Furrow, an illegal purchaser and user, with the firearms he used to kill Ileto and to injure the other victims. Defendants knew which distributors and dealers provided guns to illegal purchasers. Defendants knew that their negligent conduct created an unreasonable risk of harm to people like the plaintiffs and that the subsequent creation of an illegal secondary gun markets was a substantial factor contributing to the injuries the plaintiffs suffered. Finally, plaintiffs alleged damages for "numerous compensable injuries suffered by plaintiffs[that] include but are not limited to personal injury, death, pain and suffering, severe emotional distress, lost companionship, medical expenses, and lost income."

B. FACTS ALLEGED IN THE NUISANCE CLAIM

Plaintiffs also allege that the defendants' marketing and distribution policies "knowingly created and maintained an unreasonable interference with rights common to the general public, constituting a public nuisance under California law." Plaintiffs allege that defendants

> market, distribute, promote, and sell firearms, a lethal product, with reckless disregard for human life and for the peace, tranquility, and economic well being of the public. They have knowingly created, facilitated, and maintained an over-saturated firearms market that makes firearms easily available to anyone intent on crime. The particular firearms used in these incidents were marketed, distributed, imported, promoted, and sold by defendants in the manner set out herein, which defendants knew or should have known facilitates and encourages easy access by persons intent on murder, mayhem, or other crimes, including illegal purchasers such as

> Furrow. Their conduct has thereby created and contributed to a public nuisance by unreasonably interfering with public safety and health and undermining California's gun laws, and it has resulted in the specific and particularized injuries suffered by plaintiffs.

Although defendants knew about precautions they could have taken to decrease access by prohibited purchasers of their products, they "knowingly establish[ed], suppl[ied], and maintain[ed] an over-saturated firearms market that facilitates easy access for criminal purposes, including access by persons prohibited to purchase or possess firearms under state or federal law." Defendants' actions make the public vulnerable to crime and assault and their conduct "obstructs the free passage or use . . . of the public parks, squares, streets, and highways within the meaning of California Penal Code § 370." As alleged in the FAC, the defendants' interference with rights common to the public is unreasonable and constitutes a nuisance because:

> It significantly interferes with the public safety, health or peace. This interference is not insubstantial or fleeting, but rather involves a disruption of public peace and order in that it adversely affects the fabric and viability of the entire community, and a substantial number of persons, within the meaning of California Civil Code § 3480. . . .
>
> It is continuing conduct, and it has produced a permanent or long-lasting effect, and defendants know or have reason to know that it has a significant effect upon the public right. Defendants continually engage in their reckless conduct even though they are continually informed of the resulting substantial, permanent, and long-lasting harm and even as

> they receive daily notice from the ATF of the distribution channels they use that are doing the most harm. Defendants have reason to know—and actually know [—] of the disastrous, continuing, and long-lasting effects of their conduct on the public. . . .
>
> Though not necessarily proscribed per se by law, defendants' conduct nevertheless undermines state and federal law restricting gun sales and possession and renders enforcement of such laws difficult or impossible. In this sense, defendants' interference with a common public right is contrary to public policy as established by state and federal law, and the interference is therefore unreasonable.

Plaintiffs seek damages for injuries they suffered as a result of defendants' creation of a public nuisance.

C. DISTRICT COURT DISMISSAL AND PLAINTIFFS' CLAIMS OF NEGLIGENCE AND PUBLIC NUISANCE

Defendants Republic Arms, Inc., Jimmy L. Davis and Davis Industries (collectively, "Davis"), Quality Parts Company and Bushmaster Firearms ("Bushmaster"), RSR, Norinco, and Glock all filed motions to dismiss under Fed. R. Civ. P. 12(b)(6). In a published memorandum order, the district court granted the motions to dismiss. *See Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040 (C.D. Cal. 2002). The district court directed entry of a final judgment in favor of all moving defendants pursuant to Fed. R. Civ. P. 54(b).

On appeal, plaintiffs maintain that on the basis of the allegations stated in the FAC, they have demonstrated that all defendants, including those who manufactured and distributed the guns that Furrow fired and the guns that he carried in his arsenal during the shootings, created a secondary market targeting illegal purchasers

and promoted their products as necessary for self protection. Plaintiffs argue that defendants failed to take even minimal precautions to prevent or diminish the criminal market.[9] Plaintiffs argue that defendants created this illegal secondary market and promoted it despite the knowledge that as a result of this distribution scheme, it was reasonably foreseeable that individuals like the plaintiffs here and the public at large would be harmed. As we discuss below, taking the allegations in the FAC as true for purposes of review of a Rule 12(b)(6) dismissal, we conclude that the plaintiffs sufficiently have alleged claims for relief for negligence and public nuisance.

II. Standard Of Review

We review *de novo* a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003). Rule 12(b)(6), which tests the legal sufficiency of the claims asserted in the complaint, must be read in conjunction with Rule 8, which requires a "short and plain statement showing that the pleader is entitled to relief" and "contains a powerful presumption against rejecting pleadings for failure to state a claim." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248-49 (9th Cir. 1997) (internal citation omitted). We must take "all well-pleaded allegations of material fact as true and construe them in the light most favorable to the plaintiff." *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1021 (9th Cir. 2000).

We also must consider all inferences favoring the non-moving party that a trier of fact could reasonably draw from the evidence. *See Zimmerman v. City of Oakland*,

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[9] It should be noted that plaintiffs do not allege that the creation of *any* secondary market is a criminal market-only those markets that sell to prohibited purchasers, like Furrow, are alleged to be criminal secondary markets.

255 F.3d 734, 737 (9th Cir. 2001). However, we do not accept any unreasonable inferences or assume the truth of legal conclusions cast in the form of factual allegations. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).[10] Because we are sitting in diversity, and there are no supreme court or appellate court decisions in California that have addressed the specific claims alleged by the plaintiffs, we must attempt to determine how the California Supreme Court might decide the issue. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

III. Analysis: General Allegations Against Defendants

In *Merrill v. Navegar*, the California Supreme Court rejected a negligent design claim in the context of a product liabilities action, but the court never has addressed a negligent distribution or marketing claim. 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (2001).[11]

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[10] We note that these allegations are similar to allegations in other cases where other state courts and a federal district court have denied motions to dismiss. See discussion, *infra* at 1206-1207, 1214. We conclude as these other courts do that the facts as alleged do not require any unreasonable inferences and therefore accept them as true on review of the district court's dismissal of these claims.

[11] In *Merrill*, the California Supreme Court held that, although the plaintiffs characterized their action as a negligence claim, it was in reality a products liability action and therefore barred by then-existing California Civil Code section 1714.4, which barred gun manufacturers from liability in a products liability action. *Merrill*, 110 Cal. Rptr. 2d 370, 28 P.3d at 119. Thus, although the *Merrill* plaintiffs presented a negligent marketing claim, that claim, like the others, was actually a part of the plaintiffs' underlying defective design claim and was therefore dismissed. Plaintiffs alleged the marketing was negligent because it was marketing a defective product. The *Merrill* court noted that the plaintiffs themselves acknowledged that the marketing claim was "immaterial" to causation.

When the district court in the present case dismissed the negligence claim, it concluded that the claims before it were distinguishable from the design claims in *Merrill*. We agree that these claims are distinct from the ones raised in *Merrill*. Although *Merrill* involved allegations of negligence in gun marketing, selling, and manufacturing, "[t]he Merrill plaintiffs alleged that the defendant was negligent in 'releasing the weapons for sale to the general public even though it knew or should have known that the TEC 9 was particularly attractive to criminals and particularly suited for mass killings.'" *Ileto*, 194 F. Supp. 2d at 1051 (quoting *Merrill*, 110 Cal. Rptr. 2d 370, 28 P.3d at 121). As the district court noted, in *Merrill*, "even the negligent sale claim was based on the dangerous design of the particular firearm at issue. Additionally, the *Merrill* plaintiffs claimed that the defendant was negligent in selling the firearm generally, rather than through crime-prone distribution channels." *Id.*

The California Supreme Court concluded in no uncertain terms that the *Merrill* plaintiffs presented a negligent products liability action, and that the plaintiffs' attempts to disguise their products liability claim by avoiding the use of the word "defect" was an unsuccessful attempt to mischaracterize the true nature of the suit. *Merrill*, 110 Cal. Rptr. 2d 370, 28 P.3d at 126. In *Merrill*, distribution claims did not stand alone; references to

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According to the *Merrill* court, the plaintiffs argued: "[T]he ordinary negligence claim is directed to Navegar's conduct in making the TEC 9 available to the public. It is that unreasonable conduct that was a substantial factor in causing plaintiffs' injuries, not Navegar's marketing efforts." *Id.* at 122. Thus, contrary to the dissent's conclusion with respect to the marketing claim in *Merrill*, the California Supreme Court has yet to address the type of negligent distribution claim presented here.

"distribution" were to distribution of a defective product. Here, as the district court emphasized, "Plaintiffs . . . do not allege that Glock is negligent in distributing its firearms to the general public. Rather, they contend that Glock's distribution scheme specifically targets criminal users." *Ileto*, 194 F. Supp. 2d at 1051. Unlike the *Merrill* plaintiffs, who alleged that the gun manufacturers' decision to distribute the guns in question to the general public was negligent in light of the guns' alleged defective design features and therefore was "simply a reformulated claim that the weapon, as designed, fails the risk/benefit [products liability] test," *Merrill*, 110 Cal. Rptr. 2d 370, 28 P.3d at 126, here plaintiffs focus on the negligent distribution of a non-defective product. The focus is on the defendants' affirmative actions in distributing their products to create an illegal secondary market for guns that targets illegal purchasers.

Contrary to the dissent's mischaracterization of this case as a products liability suit, this is an action that alleges negligence and public nuisance claims; it does not allege that the guns in question were defectively designed or manufactured or that the defendants failed to affix an adequate warning on the guns. *See Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 428, 143 Cal. Rptr. 225, 573 P.2d 443 (1978) (citing the "numerous product liability precedents in California" that describe three basic categories of cases: manufacturing defects, design defects, and inadequate warnings). Thus, the dissent's reliance on *Stevens v. Parke, Davis, & Co.*, 9 Cal. 3d 51, 107 Cal. Rptr. 45, 507 P.2d 653 (1973), a case in which the California Supreme Court upheld a jury's verdict finding that the drug manufacturer "was negligent in that it failed to provide an adequate warning to the medical profession as to the dangers of [the drug in question] and

it so overpromoted [the drug] as to cause [the deceased's doctor] to prescribe the drug," *Id.* at 64, 107 Cal. Rptr. 45, 507 P.2d 653, to demonstrate that California courts would treat the current action as a products liability action is misplaced. The over-promotion claim in *Stevens* was dependent on the underlying traditional products liability claim of inadequate warnings. "Although the manufacturer or supplier of a prescription drug has a duty to adequately warn the medical profession of its dangerous properties or of facts which make it likely to be dangerous, an adequate warning to the profession may be eroded or even nullified by overpromotion of the drug through a vigorous sales program which may have the effect of persuading the prescribing doctor to disregard the warnings given." *Id.* at 65, 107 Cal. Rptr. 45, 507 P.2d 653.

In the present case, there is no such underlying products liability issue—the plaintiffs acknowledge that the products were not defective and that they did not lack necessary warnings. Rather, plaintiffs allege that through their distribution scheme, defendants created an illegal secondary market for guns targeted at illegal users. Thus, the California Supreme Court's citation in *Stevens* to the Restatement (Second) of Torts § 388, which, as the dissent acknowledges, is a section of the Restatement that addresses a theory of products liability on the basis of failure to warn, provides no indication that in light of plaintiffs' allegations, the California Supreme Court would treat plaintiffs' negligent distribution claim as one for products liability.

We also conclude that there was no statutory bar to a negligent distribution or nuisance claim at the time the case was filed (nor is there a bar today). Until January 2003, California Civil Code section 1714.4 read as follows:

> (a) *In a products liability action,* no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.
>
> (b) *For purposes of this section:*
>
> (1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.
>
> (2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.

Cal. Civ. Code section 1714.4 (repealed in 2002) (emphasis added)[12]

As the district court noted, "section 1714.4 does not by its terms bar the negligence action." *Ileto*, 194 F. Supp. 2d at 1050. Indeed, the text of the section is carefully limited to products liability actions. As explained above, unlike *Merrill*, this case is not a products liability case

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[12] The California legislature repealed section 1714.4 shortly after the California Supreme Court issued its decision in *Merrill v. Navegar*. According to many commentators, the California legislature's repeal of section 1714.4 was in direct response to the *Merrill* decision. *See* Emily Kromke, Note, *California's Legislative Response to Merrill v. Navegar: An Analysis*, 24 Whittier L. Rev. 833, 834 (2003) ("The *Merrill* court was unable to find gun manufacturers liable . . . due to California Civil Code section 1714.4. As a result, the California legislature decided to change the law to allow gun and ammunition manufacturers to be sued on product defect actions as well as negligence actions.").

reframed as a negligence case, but rather it is a classic negligence and nuisance case. Thus, although section 1714.4 was in force at the time of the shootings and at the time that the complaint was filed, it did not affect this action.[13]

In order to determine the existence and scope of duty, "we begin always with the command of . . . section 1714, subdivision (a): 'Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . .'"[14] *Merrill*, 110 Cal. Rptr. 2d 370, 28 P.3d at 123 (quoting *Christensen v. Superior Court*, 820 P.2d 181, 189 (Cal. 1991)). In *Rowland v. Christian*, the California Supreme Court explained that

> [a] departure from this fundamental principle involves the balancing of a number of considerations, the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff

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[13] The dissent cites California Civil Code section 1714.4(b) to support its argument that "California law unequivocally states that the injuries and damages here were proximately caused by Buford Furrow." This conclusion only follows, as the dissent acknowledges, "[o]nce . . . section 1714.4 [applies]." As we explained and as the district court concluded, plaintiffs' claim does not fall under this section because it is not premised on a theory of products liability. Rather, here plaintiffs contend that the defendants' actions in the creation of an illegal secondary market targeting prohibited purchasers were negligent and constituted a public nuisance—plaintiffs never alleged that the guns in Furrow's possession were defective. Plaintiffs' allegations focus on defendants' distribution scheme.

[14] The repeal of section 1714.4 coincided in 2002 with the amendment of section 1714, when the California legislature added the following text to section 1714(a): "The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section . . ."

> suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561, 564 (1968) (superseded by statute as stated in *Perez v. S. Pac. Transp. Co.*, 218 Cal. App. 3d 462, 467, 267 Cal. Rptr. 100 (1990)). *See also Merrill*, 110 Cal. Rptr. 2d 370, 28 P.3d at 124 (restating the same criteria for exceptions from the rule set forth in section 1714).

Defendants argue that an application of these criteria—especially the connection between the defendants' conduct and the injury suffered—results in the conclusion that no duty arises. However, as explained below, the plaintiffs sufficiently have alleged that it was reasonably foreseeable that defendants' actions were likely to result in the kind of harm experienced by the plaintiffs. Furthermore, plaintiffs have alleged with specificity the link between the manufacturers' and distributors' negligent behavior and the harm suffered. Because several of the defendants are situated differently, we address separately the claims against each individual defendant. However, where all defendants make the same argument, we refer to them collectively as defendants' arguments. Similarly, where the plaintiffs make allegations that apply to all defendants we refer to allegations against "defendants," including Glock and the other individual defendants. We begin with Glock, and then analyze the claims against Norinco, RSR, Bushmaster, and Davis.

A. PLAINTIFFS STATE A CLAIM FOR NEGLIGENCE

In order to establish negligence under California law, a plaintiff must establish four required elements: (1) duty; (2) breach; (3) causation; and (4) damages. *See Martinez v. Pacific Bell*, 225 Cal. App. 3d 1557, 275 Cal. Rptr. 878, 883 (1990); *see also* 6 Witkin, Summary of Cal. Law, Torts § 732, at 60-61 (9th ed. 1988).

1. GLOCK OWES PLAINTIFFS A DUTY OF CARE

Whether a legal duty arises "is a question of law which is simply an expression of the sum total of the policy considerations that lead a court to conclude that a particular plaintiff is entitled to protection." *Jacoves v. United Merchandising Corp.*, 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468, 484 (1992); *see also Ballard v. Uribe*, 41 Cal. 3d 564, 224 Cal. Rptr. 664, 715 P.2d 624, 629 n. 9 (1986). A critical part of the determination of whether a particular plaintiff is entitled to protection is whether she is "foreseeably endangered by defendant's conduct." *Jacoves*, 11 Cal. Rptr. 2d at 484. The California Supreme Court has explained that the legal duty to exercise due care so as not to create an "unreasonable risk of injury to others" extends to the "class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct[.]" *Lugtu v. California Highway Patrol*, 26 Cal. 4th 703, 110 Cal. Rptr. 2d 528, 28 P.3d 249, 256 (2001). The court continued, "[i]t is well established, moreover, that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person." *Id.*

Although whether a duty exists is a question of law, foreseeability often is a question left for the jury to de-

cide.[15] The allegations here that the defendants created an illegal secondary firearms market that was intentionally directed at supplying guns to prohibited gun purchasers like Furrow are more than sufficient to raise a factual question as to whether the defendants owed the plaintiffs a duty of care and whether the defendants breached that duty. As the California Supreme Court has stated, a defendant's duty of care extends to those individuals a defendant puts at an unreasonable risk of harm through the reasonably foreseeable actions of a third party. *Id.* Here, plaintiffs have alleged sufficient facts for a reasonable jury to conclude that through their distribution practices, defendants have created an illegal secondary market targeting prohibited purchasers that placed plaintiffs in a situation in which they were exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of a prohibited purchaser like Furrow.

Defendants point to the district court's conclusion that the "harm to these Plaintiffs was not foreseeable. While it might be foreseeable that some criminals might obtain Glock firearms and use them to harm others, there was no way of foreseeing that this particular individual (Furrow) would obtain a Glock firearm and use it to injure these Plaintiffs." *Ileto*, 194 F. Supp. 2d at 1053. However, the California Supreme Court has rejected a definition of foreseeability that requires identifying whether an individual plaintiff's injury was foreseeable in light of a particular defendant's conduct, and instead has adopted a broader categorical approach:

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[15] Whether a plaintiff is foreseeably endangered by a defendant's conduct is a question of fact, but it is often a "part of the calculus to which a court looks in defining the boundaries of 'duty.'" *Ballard*, 224 Cal. Rptr. 664, 715 P.2d at 629 n. 6.

> The foreseeability of a particular kind of harm plays a very significant role in this calculus, but a court's task—in determining duty—is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party. The jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.

Ballard, 224 Cal. Rptr. 664, 715 P.2d at 629 n. 6 (citations omitted).

Here, plaintiffs allegations in the FAC meet the foreseeability requirements for establishing a duty and a breach of that duty. Plaintiffs allege that Glock's marketing and distribution strategy includes the purposeful oversupply of guns to police departments and the provision of unnecessary upgrades and free exchange of guns with police departments to create a supply of post-police guns that can be sold through unlicensed dealers without background checks to illegal buyers at a profit. Glock allegedly targets states like Washington, where the gun laws are less strict than in California, in order to increase sales to all buyers, including illegal purchasers,

who will take their guns into neighboring California. The ATF has provided Glock with the names of the distributors who are responsible for the sales of guns that end up in the hands of criminals, but Glock has ignored the information and continues to supply these same distributors.

It is reasonably foreseeable that this negligent behavior and distribution strategy will result in guns getting into the hands of people like Furrow who are forbidden by federal and state law from purchasing a weapon. It also is reasonably foreseeable that once these prohibited purchasers obtain the firearms, they will use them for criminal activity; Congress and the California Legislature intended to prevent buyers like Furrow, who have histories of mental illness and felony convictions, from purchasing guns in part because they understood that such individuals with guns are likely to use them to shoot innocent victims. Furthermore, the kind of harm suffered (death, serious gun shot wounds, and trauma from witnessing gun violence) is the kind of harm that is reasonably foreseeable when a person who is forbidden under federal law from purchasing guns is able to purchase an arsenal as a result of the manufacturer's distribution system.

"In determining whether defendant breached a duty of care owed to plaintiff, the magnitude of the harm likely to result from [a] defendant's conduct must be balanced against the social value of the interest which he is seeking to advance, and the ease with which he may take precautions to avoid the risk of harm to plaintiff." *Musgrove v. Ambrose Properties*, 87 Cal. App. 3d 44, 150 Cal. Rptr. 722, 726 (1978). The social value of the interest defendants seek to advance and the ease with which they could take readily available precautions weigh in favor of find-

ing a breach of duty. First, plaintiffs alleged that the ATF provided manufacturers detailed reports of the distributors, dealers, and gun shows that consistently supply the guns used in crimes. Plaintiffs further alleged that the defendant manufacturers and distributors failed to utilize distribution techniques that were commonly used by other businesses to avoid distribution to illegal end users. Furthermore, the plaintiffs alleged that Glock and other defendant manufacturers negotiate contracts with distributors (including RSR) and dealers that do not include basic provisions to address the risk of acquisition of firearms by prohibited purchasers despite the fact that other forms of incentive provisions regularly were included in the contracts. According to plaintiffs, the defendants also fail to utilize basic training instruction that would help dealers and distributors recognize straw buyers or avoid distribution to illegal purchasers.

The social value of manufacturing and distributing guns without taking basic steps to prevent these guns from reaching illegal purchasers and possessors[16] cannot outweigh the public interest in keeping guns out of the hands of illegal purchasers and possessors who in turn use them in crimes like the one that prompted plaintiffs' action here.[17] The debate over the social value of guns

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[16] As noted above, federal law prohibits individuals who have been convicted of a felony and/or have a mental defect or have been institutionalized for mental illness from purchasing *or* possessing firearms.

[17] Because the dissent mischaracterizes plaintiffs' claims as products liability claims, it contends that this weighing "will require 'a jury . . . to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm," Dissent, p. 1221, quoting *Merrill*, 26 Cal. 4th at 486. Again, section 1714.4 is inapposite here; the weighing described here is the weighing required by clearly established California state law for purposes of determining whether

generally need not enter this case; rather, we must limit our evaluation to the social value of the defendants' interest in distributing the guns in a manner alleged in the FAC as "designed to facilitate and encourage easy access by prohibited persons, such as Furrow" when the defendants have the knowledge and the means to distribute guns in a manner that would reduce the risk of access and use by prohibited persons. We conclude that the social value of this practice to the defendants is outweighed by the health and safety interests of potential victims of gun violence at the hands of prohibited purchasers.

In sum, we conclude that the allegations in the FAC, which we must accept as true on review of a Rule 12(b)(6) dismissal, are sufficient to impose a duty of care on defendants.

2. THIRD PARTIES, CAUSATION AND "LIMITLESS LIABILITY"

"To establish liability in negligence, it is a fundamental principle of tort law that there must be a legal duty owed to the person injured and a breach of that duty which is the proximate[18] cause of the resulting injury." *Jacoves*, 11 Cal. Rptr. 2d at 484. Proximate cause "limits the defendant's liability to those foreseeable conse-

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a duty of care is owed to a plaintiff. *See, e.g., Musgrove*, 150 Cal. Rptr. at 726.

[18] Although the California Supreme Court has noted a preference for the use of the term "legal" causation rather than "proximate" causation, see *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1 Cal. Rptr. 2d 913, 819 P.2d 872, 879 (1991), California courts continue to use the terms interchangeably. It is clear, however, as stated in the text, that whether using the term legal or proximate to modify causation, California courts incorporate the substantial factor test into the causation analysis. *See id.*

quences that the defendant's negligence was a substantial factor in producing." *Mendoza v. City of Los Angeles*, 66 Cal. App. 4th 1333, 78 Cal. Rptr. 2d 525, 530 (1998). Whether an act is the proximate cause of injury is generally a question of fact; it "is a question of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn from those facts." *Garman v. Magic Chef, Inc.*, 117 Cal. App. 3d 634, 173 Cal. Rptr. 20, 22 (1981).

Defendants point to a New York Court of Appeals decision holding that no duty existed between a gun manufacturer and victims of a shooting. In its decision, the New York state court concluded that, when there is a third party involved, such as the shooter, a duty may arise between the manufacturer and the victim-plaintiffs but only when there is some form of a special relationship between the third person tortfeasor or between the defendants and the plaintiffs. *See Hamilton v. Beretta USA Corp.*, 96 N.Y.2d 222, 727 N.Y.S. 2d 7, 750 N.E.2d 1055, 1061 (2001). However, the present case is distinguishable because the FAC does sufficiently allege a direct link between the manufacturers distribution practices and the illegal sale of the Glock gun to Furrow that he used to kill Ileto. Furthermore, California courts apply a "substantial factor" test to determine proximate cause. The traditional notion of "but for" causation is subsumed within the substantial factor test, whereby defendants' actions may be the proximate cause of a plaintiff's injuries if those actions were a substantial factor in bringing them about. *See Mitchell v. Gonzales*, 54 Cal.3d 1041, 1 Cal. Rptr. 2d 913, 819 P.2d 872, 878

(1991). The links alleged in the FAC are not too attenuated to meet this standard.[19]

Here, Glock was in a position to prevent the harms alleged. "The key . . . is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm." *Hamilton*, 727 N.Y.S.2d 7, 750 N.E.2d at 1061. Plaintiffs alleged that Glock knew which distributors sold guns that were later found to be purchased by prohibited buyers and used in crimes and that Glock's marketing and distribution system essentially targeted the gun show and unlicensed sales market where background checks are not required so that illegal purchasers could buy their guns. Glock knew which distribution channels were providing guns to illegal purchasers and was in a position to use the information the ATF made available to it to modify its distribution practices or to offer training to its distributors that would help them identify straw purchasers and purchasers who would in turn sell to illegal purchasers like Furrow.

The Ohio Supreme Court[20] recently permitted a suit by the City of Cincinnati against gun manufacturers, trade associations, and distributors to proceed in which the city alleged nuisance, negligence, and products

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[19] Additionally, despite the fact that a significant amount of time passed in between Glock's initial sale of the gun and Furrow's subsequent purchase and shooting, the creation of the illegal secondary market was ongoing and "[p]roximity in point of time or space is no part of the definition" of proximate cause. *Osborn v. City of Whittier*, 103 Cal. App. 2d 609, 230 P.2d 132, 136 (1951).

[20] Like the California Supreme Court, the Ohio Supreme Court looks to the Restatement (Second) of Torts §§ 448 and 449 in determining whether a defendant may be liable for third party acts under a negligence theory of liability. *See Federal Steel & Wire Corp. v. Ruhlin Const. Co.*, 543 N.E.2d 769, 774-75 (Ohio 1989).

liability claims for the harm caused by the firearms the defendants manufactured, sold, and distributed. *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136 (2002). Rejecting the defendants' arguments that the harm was too attenuated and that they did not have a duty to control third parties, the Ohio Supreme Court explained that

> the negligence issue before us is not whether appellees owe appellant a duty to control the conduct of third parties. Instead, the issue is whether appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a way that creates an illegal firearms market that results in foreseeable injury. Consequently, the 'special relationship' rule is not determinative of the issue presented here. Instead, the allegations of the complaint are to be addressed without resort to that rule.

Id. at 1144.

Similarly, the Ohio Supreme Court noted with approval a Massachusetts state court decision in which it recognized that "Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs." *Boston v. Smith & Wesson*, 12 Mass. L. Rptr. 225, 2000 WL 1473568, *15. Here,

> [t]aking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus, it is affirmative conduct that is alleged—the creation of the illegal secondary firearms market. The method by which Defendants

> created this market, it is alleged, is by . . . selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons, or others not permitted to use firearms in Boston. Taken as true, these facts suffice to allege that Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm. Worded differently, the Plaintiffs were, from Defendants' perspective, foreseeable plaintiffs. Thus, the court need not decide whether Defendants owed a duty greater than the basic duty.

Boston, 2000 WL 1473568, at *15.

We also agree with the duty analysis of the district court for the Northern District of Ohio when it denied a Rule 12(b)(6) motion and allowed a city's negligence claims against gun manufacturers and sellers to proceed, explaining:

> [i]t cannot be said, as a matter of law, that Defendants are free from negligence because they do not owe Plaintiffs a duty of care. It is now, unfortunately, the common American experience that firearms in the hands of children or other unauthorized users can create grave injury to themselves and others, thus creating harm to municipalities through physical and economic injury. It is often for a jury to decide whether a plaintiff falls within the range of a duty of care and whether that duty was fulfilled . . .

White v. Smith & Wesson, 97 F. Supp. 2d 816, 828-29 (N.D. Ohio 2000)[21]

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[21] The district court in Ohio premised this statement on a definition of the test for foreseeability that is markedly similar to the test used by California courts to define when an injury is foreseeable.

In sum, here, it cannot be said that as a matter of law no duty was owed to the plaintiffs. On the contrary, under California negligence law, the plaintiffs' complaint alleged sufficient facts to permit a jury to conclude that Glock owed a duty to the plaintiffs, that the duty was breached, and that the breach was the proximate cause of those injuries.

3. INTERVENING ACT WAS FORESEEABLE

As a part of their argument that the link between the harm suffered by the plaintiffs and the actions of the defendants is too attenuated, Glock and the other defendants note that it was Furrow who shot the gun and that his wrongful act was the immediate cause of the injuries suffered by Ileto and the children at the JCC. However, the fact that there was an intervening act by Furrow is not fatal to the plaintiffs' claim on a Rule 12(b)(6) motion. To the contrary, under California law, where an intervening act by a third party was foreseeable, it does not amount to a superseding cause relieving the negligent defendant of liability. In *Landeros v. Flood*, an eleven year-old girl was taken into a hospital with several injuries suggesting that she had been physi-

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Compare White v. Smith & Wesson, 97 F. Supp. 2d 816, 828 (N.D. Ohio 2000) ("The test for foreseeability is whether a reasonably prudent person, under the same or similar circumstances as the defendant, should have anticipated that injury to the plaintiff or to those in like situations is the probable result of the performance or nonperformance of an act" (quoting *Commerce & Industry Ins. Co. v. City of Toledo*, 45 Ohio St.3d 96, 543 N.E.2d 1188, 1192 (1989)), *with Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal. 3d 49, 192 Cal. Rptr. 857, 665 P.2d 947, 952 (1983)) ("[Foreseeable injuries] include[ ] whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct . . . One may be held accountable for creating even the risk of a slight possibility of injury if a reasonably prudent [person] would not do so.") (internal citations omitted).

cally abused. 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389, 390 (1976). After treating the child for an unexplained broken ankle and other injuries, the treating doctor failed to report the child as a potential victim of child abuse. The child then suffered permanent injuries upon her return to her mother. *Id.* The California Supreme Court addressed the hospital's argument that, because the abuse was the immediate cause of the child's injury, its doctor's negligence could not be considered the proximate cause of the harm suffered by the child:

> Under the allegations of the complaint it is evident that the continued beating inflicted on Plaintiff by her mother and [the mother's husband] after she was released from the San Jose Hospital and returned to their custody constituted an 'intervening act' that was the immediate cause in fact of the injuries for which she seeks to recover. (Rest. 2d Torts, section 441). It is well settled in this state, however, that an intervening act does not amount to a 'superseding cause' relieving the negligent defendant of liability if it was reasonably foreseeable: '[A]n actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct'.

Landeros, 131 Cal. Rptr. 69, 551 P.2d at 395 (internal citations omitted).[22]

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[22] California courts have adopted the Restatement of Torts' treatment of whether a duty to foreseeable plaintiffs exists despite an intervening act in cases involving negligent acts by third parties, *see Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 157 P.2d 372 (1945), as well as criminal acts by third parties, *see Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955). *See generally, Arden Farms* 157

Plaintiffs have alleged that Glock knew that its distribution system and marketing policies would help to foster an illegal secondary gun market. This secondary market promotes illegal gun purchases by individuals who are forbidden by state and federal law from purchasing guns due to felony convictions or mental impairments. The law prohibits these individuals from purchasing and possessing firearms because lawmakers determined that they posed a greater risk of using the guns for illegal purposes. Thus, it was reasonably foreseeable that if Glock continued to foster the illegal secondary market, a person like Furrow who was prohibited by law from purchasing a gun would be able to purchase one and use the gun in the manner that was the basis for prohibiting such purchases in the first place.

Additionally, as the California Supreme Court has noted, under "section 449 of the Restatement Second of Torts . . . foreseeability may arise directly from the risk created by the original act of negligence: 'If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.'" *Landeros*, 131 Cal. Rptr. 69, 551 P.2d at 395 (internal citations omitted).

In sum, under well-established California law, we hold that the plaintiffs have alleged sufficient facts, which if established by a preponderance of the evidence, would entitle them to relief.

P.2d at 375 ("It has been held that the rules on the subject in the Restatement of Torts sections 442-453, are applicable in this state.")

B. PUBLIC NUISANCE

"[A] principal office of the centuries-old doctrine of the 'public nuisance' has been the maintenance of public order—tranquility, security and protection—when the criminal law proves inadequate." *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 60 Cal. Rptr. 2d 277, 929 P.2d 596, 603 (1997). Citing the Restatement (Second) of Torts § 821B (1979),[23] the California Supreme Court has identified five general categories of public rights that, when unreasonably interfered with, can give rise to a claim for a public nuisance: "the public health, the public safety, the public peace, the public comfort or the public convenience." *Id.* at 604. The California Supreme Court also has recognized that California's early common law categories broadly define anything that is "injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway," as a nuisance. *Id.* (citing Cal. Civ. Code § 3479).

Generally, the Restatement (Second) of Torts reflects this broad interpretation of what constitutes a public nuisance.[24] The Restatement sets forth several circum-

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[23] Unless otherwise noted, all citations to the Restatement (Second) of Torts are to the 1979 edition.

[24] The California Supreme Court has essentially adopted the definition of public nuisance in the Restatement (Second) of Torts, describing the publication of the Restatement (Second) as "crystall[izing]" the law of public nuisance "to such an extent that its features could be clearly delineated" into the five general categories of public rights described above. *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 60 Cal. Rptr. 2d 277, 929 P.2d 596, 604 (1997).

stances under which interference with a public right may be deemed intentional and unreasonable and therefore give rise to liability for a public nuisance. The Restatement defines an intentional invasion of the public right as follows:

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
>
> (a) acts for the purpose of causing it, or
>
> (b) knows that it is resulting or is substantially certain to result from his conduct.

Restatement (Second) of Torts § 825.

Furthermore, the Restatement explains that whether interference with a public right is unreasonable should be determined by evaluating the following circumstances:

> (a) Whether the conduct involves significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B(2).[25]

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[25] Note that these guidelines are connected by the disjunctive "or." *See also People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P.2d 600, 603-604 (1976) (noting the "substantial identity of definitions appearing in Penal Code sections 370 and 371, and Civil Code sections 3479 and 3480," and going on to restate Cal. Penal Code section 370 as broadly defining a public

Here, the plaintiffs allege that Glock (and all of the other defendants) market, distribute, promote, and sell their products with reckless disregard for human life and for the peace, tranquility, and economic well being of the public. Furthermore, defendants have created a firearms market that is oversaturated and their conduct have unreasonably interfered with public safety and health. By their alleged actions, defendants have caused the specific and particularized injuries to the plaintiffs. Plaintiffs further allege that Glock's (and all of the defendants') actions are ongoing and that the defendants have actual knowledge of the damaging impact of their distribution and marketing practices on the health, safety, and welfare of the California public.[26]

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nuisance as "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons . . .").

[26] Defendants argue, and the district court agreed, that nuisance law does not apply to the lawful manufacture and sale of non-defective products. *See Ileto*, 194 F. Supp. 2d at 1058. Although the district court noted that no California court has addressed whether a public nuisance claim will lie under the circumstances presented in this case, it agreed with the Eighth Circuit that "if defective products cannot constitute a public nuisance, then products which function properly do not constitute a public nuisance." *Id.* (quoting *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002)).

Plaintiff's nuisance claim, however, is not about the manufacture or distribution of a defective or properly functioning product. Notably, plaintiffs do not allege a product defect but rather allege affirmative conduct on the part of manufacturers and distributors that fosters an illegal secondary gun market that interfered with the public right to safety. The California Supreme Court has never limited public nuisance suits in a manner that would prevent the claim alleged here.

The plaintiffs have alleged that the distribution scheme developed by gun manufacturers and distributors including defendants have unreasonably interfered with various public rights including "the public health, the public safety, the public peace, the public comfort or the public convenience." *Acuna*, 60 Cal. Rptr. 2d 277, 929 P.2d at 604. The California Supreme Court has adopted the Restatement of Torts's definition of a public right as one "common to all members of the general public. It is collective in nature [.]" *Id.* (quoting Restatement (Second) of Torts § 821B). Furthermore, the interference alleged here is "both substantial and unreasonable." *Id.* The California Supreme Court has looked to the Restatement of Torts to define the substantiality requirement in a public nuisance claim as proof of significant harm, harm that is "real and appreciable invasion of the plaintiff's interests," and is "definitely offensive, seriously annoying or intolerable." *Id.* at 605 (quoting Restatement (Second) of Torts § 821B). Facilitating the purchase of guns by individuals declared unfit to buy guns by the state and federal legislatures would qualify as "definitely offensive," and certainly more than "seriously annoying."

1. STANDING TO BRING THE PUBLIC NUISANCE CLAIM

The district court concluded that the majority of the plaintiffs had standing to bring a public nuisance claim. *Ileto*, 194 F. Supp. 2d at 1057. Pursuant to California Civil Code section 3493, "[a] private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Cal. Civ. Code § 3493. California courts generally have limited the group of plaintiffs with standing to sue on a public nuisance theory to plaintiffs who can "show special injury to himself of a

character different in kind—not merely in degree—from that suffered by the general public." *Institoris v. City of Los Angeles*, 210 Cal. App. 3d 10, 258 Cal. Rptr. 418, 424 (1989) (emphasis in original); *see also Baker v. Burbank-Glendale-Pasadena Airport Authority*, 220 Cal. App. 3d 1602, 270 Cal. Rptr. 337 (1990); Restatement (Second) of Torts § 821C(1) (1977) ("In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.").

The district court found that plaintiffs Stepakoff, Finkelstein, Kadish, and Ileto alleged harms that "meet[ ] the requirement that they suffer harm different in kind, rather than degree, from the general public." *Ileto*, 194 F. Supp. 2d at 1057. The district court declined to "conclusively resolve" the issue of whether Powers, who was not shot, but witnessed the shootings and was traumatized by the events, also suffered a harm different in kind, rather than degree, from the general public because it ultimately denied all of the plaintiffs' nuisance claims on other grounds as well. *Id.*

We agree that, on the basis of the facts alleged, plaintiffs Stepakoff, Finkelstein, Kadish, and Ileto all suffered an injury, namely trauma resulting from an assault with a gun and gun shot wounds, different in kind from the general public. Furthermore, plaintiff Powers allegedly suffered "specific and direct physical and emotional injuries . . . by[the] shock to his nervous system upon experiencing and witnessing the events described herein." This harm is different in kind from the harm allegedly suffered by the general public. These physical and mental injuries are different in kind from the "danger, fear,

inconvenience, and interference with the use and enjoyment of public places that affect the tenor and quality of everyday life" that plaintiffs allege are suffered by the general public.

2. GLOCK'S CONTROL OVER THE FIREARM WHEN DISCHARGED

Glock also argues that the plaintiffs failed to allege that Glock had control over the gun when the plaintiffs were injured and that such control is a necessary element of a nuisance claim. Although it is unclear under California law whether a special relationship demonstrating control over the instrument that caused the nuisance is required for showing proximate cause, *compare City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 35 Cal. Rptr. 2d 876, 882 (1994) (declining to decide whether California nuisance law requires the defendant to own or control the means of causing the nuisance), *with Martinez*, 275 Cal. Rptr. at 883 (rejecting a nuisance claim because it concluded that there was no special relationship between the defendant and the third party and therefore no proximate causation), we agree with the district court that if the California Supreme Court were confronted with this issue, it would require a showing of legal or proximate causation. However, we conclude that California's law of proximate or legal cause does not contain a control requirement. "Proximate causation requires simply that 'the act or omission of the defendant be a 'substantial factor to the harm suffered.'" *Adams v. City of Fremont*, 68 Cal. App. 4th 243, 80 Cal. Rptr. 2d 196, 211 (1998) (quoting *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1 Cal. Rptr. 2d 913, 819 P.2d 872 (1991)). Here, as described above in our discussion of the proximate causation required for negligence liability, *see supra* at pp. 1205-1208, plaintiffs have sufficiently alleged that Glock's

actions fostered an illegal secondary market that foreseeably led to a prohibited purchaser, Furrow, gaining access to firearms that he later used to kill and injure innocent people.

The Ohio Supreme Court, which, like the California Supreme Court, also has adopted the interpretation of nuisance as set forth in the Restatement (Second) of Torts,[27] rejected a similar claim by defendants who argued that they could not be held liable for the harm alleged because they did not have control over the alleged nuisance at the time of the injury. "[A]ppellant alleged that appellees control the creation and supply of this illegal secondary market for firearms, not the actual use of the firearms that cause injury . . . Just as the individuals who fire the guns are held accountable for the injuries sustained, appellees can be held liable for creating the alleged nuisance." *City of Cincinnati*, 768 N.E.2d at 1143. The Ohio Supreme Court explained the relationship between control and causation as follows:

> [I]t is not fatal to appellant's public nuisance claim that appellees did not control the actual firearms at the moment that harm occurred . . . appellant alleged that appellees control the creation and supply of this illegal, secondary market for firearms, not the actual use of the firearms that cause injury. Just as the individuals who fire the guns are held accountable for the injuries sustained, appellees can be held liable for creating the alleged nuisance.

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[27] *See Cincinnati v. Beretta U.S.A., Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136, quoting 4 Restatement (Second) of Torts § 821B(1) (1965) (defining a public nuisance as "an unreasonable interference with a right common to the general public.").

Id.; *see also City of Chicago*, 271 Ill. Dec. 365, 785 N.E.2d at 31.[25]

Thus, we conclude that Glock's acts as alleged in the FAC would allow a reasonable jury to conclude that the defendants' acts were the cause of the plaintiffs' injury. The plaintiffs have not alleged that Glock or the other defendants had control over the guns at the time of the shooting, but this is not fatal to their public nuisance claims.

3. CALIFORNIA LAW DOES NOT LIMIT NUISANCE TO PROPERTY CLAIMS

The district court concluded that a nuisance claim could not lie here by relying on a Michigan state case (a case that was cited "with approval" by the California Supreme Court in *City of San Diego*) that holds that "nuisance cases 'universally' concern the use or condition of property, not products." *Ileto*, 194 F. Supp. 2d at 1058 (quoting *Detroit Bd. of Educ. v. Celotex Corp.*, 196 Mich. App. 694, 493 N.W.2d 513, 521 (1992)). However, the district court's determination that a nuisance must be associated with property is contrary to clearly established California law. California law has never imposed such a requirement that there be some form of an injury to land or property; indeed, as noted above, California common law consistently has defined nuisance in broad terms that encompass injuries to health, or acts that are "indecent or offensive to the senses" *or* obstructions to the free use of property in any manner that might

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[25] We recognize that the plaintiffs in these public nuisance cases were cities rather than individuals. However, it is clear that under California law an individual may make a public nuisance claim. California Civil Code section 3493 provides that a "private person may maintain an action for public nuisance, if it is specially injurious to himself, but not otherwise."

interfere with the "comfortable enjoyment of life *or* property." *Acuna*, 60 Cal. Rptr. 2d 277, 929 P.2d at 615 (citing Cal. Civ. Code § 3479) (emphasis added); *see also Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116, 99 Cal. Rptr. 350, 355 (1971) ("[T]he term 'public nuisance' comprehends an act or omission which interferes with the interests of the community or the comfort and convenience of the general public and includes interference with the public health, comfort and convenience.") (internal citations omitted).[29]

Comment h to Section 821B of the Restatement (Second) of Torts states that "unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land." Restatement (Second) of Torts § 821B, comment h; *see also City of Chicago v.*

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[29] In light of these California cases and California Civil Code section 3479, the dissent's contention that we rely on out of state law to support our conclusion that under California law there is no requirement that nuisance be associated with property is puzzling. Furthermore, we have "an answer for the following twelve words—'nuisance cases 'universally' concern the use or condition of property, not products.'" Dissent at 1223, citing *City of San Diego*, 30 Cal. App. 4th at 586, 35 Cal. Rptr. 2d 876. The dissent fails to note that its quotation is from a citation to a Michigan Court of Appeals case, cited by the California Court of Appeal to support its contention that other "courts that have considered this question [whether plaintiffs can recover damages for defective asbestos-containing building materials under a nuisance action] have rejected a nuisance claim as a theory of recovery for asbestos contamination." *City of San Diego*, Cal. App. 4th at 586. *City of San Diego* was a products liability suit. The California Court of Appeal in City of San Diego addressed the plaintiff's attempt to maintain a products liability action as a nuisance action, explaining that "no California decision . . . allows recovery for a defective product under a nuisance cause of action." *Id.* This is not a products liability action; unlike *City of San Diego*, here we do not have "a products liability action in the guise of a nuisance action." *Id.* at 587, 35 Cal. Rptr. 2d 876.

Beretta U.S.A. Corp., 337 Ill. App. 3d 1, 271 Ill. Dec. 365, 785 N.E.2d 16 (2003) (rejecting contention that public nuisance law is limited to actions involving real property or to statutory or regulatory violations involving public health or safety and permitting nuisance claim to go forward);[30] *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136, 1142 (2002) (same).

4. California Law Permits Nuisance Suits In Legal, Regulated Industries

Additionally, the fact that the manufacture and sale of guns is legal does not prevent the plaintiffs from pursuing their nuisance claim. Here, the alleged nuisance is not premised on the legal manufacture and design of the guns or the sale of guns to individuals who are legally entitled to purchase them. On the contrary, the nuisance claim rests on the defendants' actions in creating an illegal secondary market for guns by purposefully oversaturating the legal gun market in order to take advantage of re-sales to distributors that they know or should know will in turn sell to illegal buyers. We agree with the Ohio Supreme Court's conclusion "that under the Restatement's broad definition, a public nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right

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[30] In Illinois, as in California, the state supreme court has adopted the Restatement (Second) of Torts definition of public nuisance. *See City of Chicago v. Beretta U.S.A. Corp.*, 337 Ill.App.3d 1, 271 Ill.Dec. 365, 785 N.E.2d 16, 24 (2002). *See also Young v. Bryco Arms*, 765 N.E.2d 1, 10-11 (2001) (citing section 821B to define public nuisance and holding that plaintiffs' complaints sufficiently pleaded a right common to the general public, unreasonable interference with that right, and resulting damages, as the elements of a cause of action for public nuisance in a case against gun manufacturers).

common to the general public." *City of Cincinnati*, 768 N.E.2d at 1142.

Over one hundred years ago, a California state court explained that the fact that a certain occupation or business can be performed in a legal manner does not prevent that occupation or business from becoming a nuisance when the occupation or business is performed in a manner that unreasonably infringes on a public right. *See Woodruff v. North Bloomfield Gravel Mining Co.*, 9 Sawy. 441, 18 F. 753 (1884) (explaining that although mining is lawful and regulated by statute, the "results of those acts" can become a public or private nuisance). The fact that a statute recognizes the legality of a certain occupation and makes provision for its regulation to avoid injuries does not justify or legalize such a business when it becomes a public nuisance. *See id.*

Similarly, although gun manufacturing is legal and the sale of guns is regulated by state and federal law, the distribution and marketing of guns in a way that creates and contributes to a danger to the public generally and to the plaintiffs in particular is not permitted under law. Plaintiffs allege that the defendants knew or should have known that their marketing, promotion, distribution, importation, and sale of firearms, by which each of the firearms used in the incidents alleged here came to be in the possession of a person like Furrow, would likely result in injuries of the type suffered by the plaintiffs. *See Nat'l Ass'n for the Advancement of Colored People v. Acusport, Inc.*, 271 F. Supp. 2d 435, 484 (E.D.N.Y. 2003) (finding, after trial, that the plaintiffs demonstrated that the defendants created a public nuisance and rejecting defendant gun manufacturers' defense that selling guns is legal because "[w]hile the fact that a defendant's conduct is otherwise lawful is a factor to consider in

determining whether the interference with the public right is substantial, it is no defense to an action for public nuisance. . . . That a regulatory statutory scheme exists to govern some conduct does not alone mean that conduct is fully authorized.").

We conclude that the plaintiffs have alleged sufficient facts under well established California Supreme Court nuisance law to survive the defendants' Rule 12(b)(6) motion, and therefore reverse the district court's ruling granting Glock's motion to dismiss the public nuisance claim.

IV. Negligence And Nuisance Claims Against Norinco

We agree with the district court that the plaintiffs' allegation that Furrow used a 9mm gun in both shootings, and the plaintiffs' allegation that the Norinco gun used 9mm ammunition, was sufficient for purposes of the defendants' motion to dismiss to connect Norinco to plaintiffs' injuries. The general factual allegations stated in the FAC apply to all defendants, including the allegations regarding the creation of a secondary market that targets illegal gun purchasers. These general allegations include the claim that, despite the extensive documentation in ATF reports and information that identifies those distributors that provide the most guns to illegal purchasers, manufacturers and distributors, including Norinco, continue to develop distribution channels that promote straw purchases and other means of distribution that facilitate access to guns by prohibited purchasers.

We note that the specific allegations in the FAC that trace the Glock gun from the manufacturer to the police department to several distributors, including RSR, to gun collectors and ultimately to Furrow do not apply to Norinco. However, because the general allegations in-

cluded in the FAC described above satisfy all of the requisite elements for negligent distribution and public nuisance claims, we also reverse the district court's dismissal of plaintiffs' negligence and nuisance claims against Norinco.

V. Defendants RSR Management And RSR Group Nevada

Plaintiffs alleged with particularity the role of RSR as a distributor that enabled Furrow to obtain the Glock gun that he used to shoot and kill Ileto. Therefore, the analysis above with respect to the negligence and nuisance claims against Glock applies to RSR as well. Both were key players in the distribution scheme that allegedly targeted illegal purchasers. RSR, as the distributor, had access to the same ATF reports and, as alleged in the complaint, knew or should have known that, by furnishing Dineen with two new Glock guns and agreeing that payment did not have to be made until the former guns were sold, they were contributing to the creation of the illegal market that enabled a prohibited purchaser like Furrow to obtain the gun he used to kill Ileto and may have used to shoot the victims at the JCC. Accordingly, we reverse the district court's dismissal of the plaintiffs' negligence and nuisance claims against RSR.

VI. Bushmaster, Republic Arms, Jimmy Davis, And Davis Industries

Although most of the analysis above with respect to Glock and Norinco would apply to Bushmaster, Republic Arms, Jimmy Davis, and Davis Industries if the guns they manufactured had been fired by Furrow, a claim for nuisance and negligence cannot stand where the weapons were not actually fired. The guns produced by these manufacturers were carried by Furrow on the day of the shootings, but they were not chambered for 9mm ammu-

nition. The facts alleged that only the Glock and Norinco guns were capable of expending the 9mm casings. The requirements for a negligence claim, including allegations that the manufacturers' breach caused the plaintiffs' injuries, cannot be met where the gun was not fired. Furthermore, under a nuisance claim, the requirement that plaintiffs allege injuries different in kind from those suffered by the general public, could not be met under these circumstances when the gun at issue was not allegedly fired. Therefore, we affirm the district court's orders dismissing plaintiffs' action against Bushmaster, Republic Arms, Jimmy Davis, and Davis Industries.

VII. Lilian Ileto's Survival And Wrongful Death Claims

In addition to the nuisance and negligence claims alleged by the other plaintiffs, Lilian Ileto brought under Count I a survival claim. In Count I, Lilian Ileto sought damages for all loss or damage that Ileto sustained or incurred before death as a result of the defendants' conduct, including punitive damages that Ileto would have been entitled to recover had he lived, together with attorneys' fees and other costs. Lilian Ileto also alleged a wrongful death claim in Count II. On appeal, plaintiffs do not specifically address the wrongful death and survival claims as distinct from the negligence and nuisance claims. Plaintiffs note in their statement of the case that the FAC retained Ileto's survival and wrongful death claims, but the plaintiffs do not mention them again in their opening brief or in their statement of the issues.

However, because the survival and wrongful death claims incorporate the negligence and nuisance claims, we conclude that Lilian Ileto may continue to pursue

these claims on remand.[31] Therefore, our reversal of the summary judgment against the plaintiffs on the negligence count also encompasses the summary judgment against Lilian Ileto on her wrongful death and survival claims.[32]

VIII. COMMERCE CLAUSE DOES NOT BAR THIS SUIT

Finally, the defendants argue that the FAC is "so broadly drafted as to manifest regulatory ambitions that run afoul of the United States Constitution." Specifically, the defendants contend that the suit would violate the Commerce Clause and the Due Process Clause because it would regulate a lawful national industry. We reject both claims.

Generally, Commerce Clause claims are brought against a state law or regulation. "In order to establish a claim under the so-called dormant Commerce Clause, [Defendants] must show that the state law or regulation in question penalizes interstate commerce, and does so without sufficient economic justification." *National Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir.), *amended on denial of reh'g en banc*, 312 F.3d 416 (2002); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90

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[31] California courts consistently incorporate the elements of a negligence claim into a wrongful death claim. *See, e.g., Anaya v. Superior Court*, 96 Cal. App. 4th 136, 116 Cal. Rptr. 2d 660, 662 (2002) (explaining that plaintiffs had "alleged facts sufficient to plead the elements of duty and breach for a negligence (wrongful death) cause of action.") (parenthetical in original); *see also Sandoval v. Bank of America*, 94 Cal. App. 4th 1378, 115 Cal. Rptr. 2d 128, 130 (2002) (addressing petitioner's wrongful death complaint on the basis of defendant's alleged negligence).

[32] With respect to the survival and wrongful death claims, the FAC set forth the necessary declarations and attachments to establish Lilian Ileto as sole heir and the one entitled to Ileto's property for intestate succession. *See* Cal. Prob. Code sections 377.30 & 377.60.

S.Ct. 844, 25 L. Ed. 2d 174 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

However, in *BMW of North America v. Gore*, the Supreme Court noted that a statute or regulation is not necessary for asserting a dormant Commerce Clause claim: "State power may be exercised as much by a jury's [or judge's] application of a state rule of law in a civil lawsuit as by a statute." 517 U.S. 559, 572 n. 17, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Additionally, the Supreme Court has explained that "it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572, 116 S. Ct. 1589.

The present case is clearly distinguishable from *BMW*. First, in their FAC, plaintiffs abandoned all requests for injunctive relief and economic sanctions in the form of punitive damages to protect the rights of citizens from other states. In *BMW*, the Supreme Court vacated a punitive damages award as excessively large under the Due Process Clause. Furthermore, the "regulation" alleged by the defendants in this case could not be construed as one which purposefully or arbitrarily discriminates between residents and nonresidents. Rather, the economic "regulation" that defendants allege is most accurately construed as a form of regulation that "has only indirect effects on interstate commerce and regulates even-handedly." *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476 U.S. 573, 578-79, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). When this type of

regulation is at issue, the Supreme Court has stated that we must "examine[ ] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.*

Here, the state's interest in protecting the health and safety of its residents is clearly legitimate, and whatever indirect burden an award of damages to the plaintiffs might have on the defendants, it does not approximate the public interest in protecting the health and safety of California's citizens. In sum, the defendants' Commerce Clause argument is meritless and we reject it.

CONCLUSION

For the reasons stated above, we reverse the district court's orders granting dismissal of the plaintiffs' actions against Glock, Norinco, and RSR on the negligence, public nuisance, survival, and wrongful death claims, and remand for further proceedings. We affirm the district court's orders granting dismissal of the plaintiffs' action against Bushmaster, Republic Arms, Jimmy Davis, and Davis Industries.

All parties to bear their own costs on appeal.

REVERSED in part, AFFIRMED in part, and REMANDED.

CYNTHIA HOLCOMB HALL, Circuit Judge, dissenting.

"Whatever personal emotions and personal views members of this court may have in this tragic case, those feelings must be put aside in resolving the narrow legal question decided here." *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 492, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (2001) (Kennard, J., concurring).

I understand the majority's desire to ensure that the appellants have their day in court. But I do not concur in the majority's opinion because I believe that it runs afoul of some of our most basic duties as federal judges. When exercising our diversity jurisdiction, we are required to apply state law whether we agree with it or not. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938).

The majority's almost exclusive reliance on authority from outside of California speaks volumes about how a California court would rule on this case. To reach its result, the majority must look outside California because when a proper analysis of California's statutes and cases is conducted, it becomes clear that the district court correctly dismissed appellants' claims. The majority essentially overlooks California law, relying instead on cases from other jurisdictions, nonbinding legal treatises, and abstract common law principles to arrive at its conclusions. But "[t]here is no general federal common law." *Erie*, 304 U.S. at 78, 58 S. Ct. 817. Sitting in diversity, we are not free to pick and choose from the many different common law principles that have been developed in the fifty states. Our role is "to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) (emphasis added).

When this case is analyzed under the applicable statute and most closely analogous California cases, this court has little choice but to affirm the district court's well-reasoned decision.

I respectfully dissent.

* * *

As I explain below, the majority commits three errors in its analysis. First, it fails to recognize that this action is a products liability action and therefore is barred by a California statute. Cal. Civ. Code § 1714.4.[1] Second, the negligence theory espoused by the majority was specifically rejected by the California Supreme Court in *Merrill v. Navegar*, 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (2001). Third, the nuisance theory adopted by the majority contradicts relevant California authority.

THIS PRODUCTS LIABILITY ACTION IS BARRED BY SECTION 1714.4

The question of how to characterize this civil action is not merely academic—it is dispositive. In both their negligence and nuisance claims, appellants allege that their injuries were caused by the potential of appellees' products to cause serious injury or death. But in products liability actions, California Civil Code section 1714.4 declares that "[i]njuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious in-

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[1] Although the statute was repealed effective January 1, 2005, its repeal does not affect this action because the Legislature did not express an intent to apply its repeal retroactively. *See Myers v. Philip Morris Companies, Inc.*, 28 Cal. 4th 828, 840, 123 Cal. Rptr. 2d 40, 50 P.3d 751 (2002) ("retroactive application [of a law] is impermissible unless there is an express intent of the Legislature to do so"). Section 1714.4 was in effect when the instant action was filed and when the events giving rise to it occurred.

jury, damage, or death, but are proximately caused by the actual discharge of the product." Cal. Civ. Code § 1714.4(b)(2). Thus, the plain terms of this statute preclude appellant's theory of causation. The majority gets around this absolute bar to appellants' claims by arguing that appellants have not actually brought a products liability lawsuit. But the claims alleged by appellants can be characterized as nothing but products liability claims.

A brief history of products liability law illustrates why this is a products liability action. Today, we take for granted that a manufacturer may be held liable for foreseeable damages caused by its products. But less than a century ago, this was a foreign concept in our nation's jurisprudence. At common law, a manufacturer was immune from liability in cases where the plaintiff alleged an injury that was caused by the manufacturer's products, absent privity between the manufacturer and the plaintiff. With Justice (then-Judge) Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), the doctrine of privity as a bar to recovery in these suits began to wane. In *MacPherson*, the New York Court of Appeals allowed a driver to sue Buick in negligence after a defective tire caused him to be thrown from his car and injured, even though there was no privity between the driver and Buick-Buick had sold the car to a dealer first. *Id.* at 385-86, 111 N.E. 1050. Soon, not only consumers, but any person who could foreseeably be damaged by a product could sue in negligence for manufacturing or design defects. By 1963, even negligence was no longer a requirement, as the California Supreme Court, through Justice Traynor, established that manufacturers were strictly liable for injuries their defective products caused foreseeable victims. *See Greenman v. Yuba Power Products, Inc.*, 59

Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963). So in the span of half a century, tort law developed from effectively barring victims from suing a manufacturer for damages caused by products the manufacturer had placed in the stream of commerce, to allowing any foreseeable person who could be injured by a product to sue. This history provided the backdrop for the development of the branch of law known as products liability. No other branch of law deals with a manufacturer's liability to consumers or bystanders with whom it otherwise has no relationship for damages caused by its products.

To justify my conclusion that this is undoubtedly a products liability suit, I turn to the very case that appellants have cited most often to support their theories, *Stevens v. Parke, Davis, & Co.*, 9 Cal. 3d 51, 107 Cal. Rptr. 45, 507 P.2d 653 (1973). In *Stevens*, the plaintiffs alleged that the defendant drug manufacturer was negligent because it over-promoted the drug Chloromycetin with the intent that doctors would not prescribe it correctly. *Id.* at 65, 107 Cal. Rptr. 45, 507 P.2d 653. This theory closely parallels what plaintiffs suggest here: the gun manufacturers over-sold their products knowing that the guns would end up in the hands of people who would misuse them. In *Stevens*, the California Supreme Court treated the action as a products liability action. *See Id.* at 64, 107 Cal. Rptr. 45, 507 P.2d 653 ("One who supplies a product directly or through a third person 'for another to use is subject to liability to those whom the supplier should expect to use the [product]'") (quoting Restatement (Second) of Torts § 388, which describes failure to warn claims in products liability law). Given the similarities between this case and Stevens, California courts would be required to treat this case as a products liability action. As such, it is governed by section 1714.4.

The majority insists that this a "*classic* negligence and nuisance case." At the same time, however, the majority does not cite a single case from California which relies upon a nonproducts liability theory to hold a manufacturer liable for injuries caused by the use of its products. The majority tells us this case is not about defective products; it is about "certain affirmative conduct . . . that fosters an illegal secondary gun market." But when it accepts appellees' negligent marketing argument, the majority allows itself to be persuaded by an argument that is irrelevant in tort except insofar as it tends to prove one element in a products liability cause of action. Whether the gun manufacturers sell their products with the knowledge that they will find their way to criminals may bear upon who is a foreseeable plaintiff in the event that a defective gun causes injury. But to assert that this action is not about products borders on the absurd. This case is about guns. If appellees were selling bubble gum, the case would be markedly different. Alleging a defect or failure to warn is generally necessary to prevail in a products liability suit, but it is not the *sine qua non* for bringing a suit that sounds in products liability. The nature of appellees' conduct cannot be analyzed apart from the product they are selling.

Under section 1714.4, appellants' claims are doomed. Both claims allege that the injuries were caused by appellees' products' potential to cause serious injury, damage, or death. However, "[i]njuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product." Cal. Civ. Code

§ 1714.4(b).[2] California law unequivocally states that these injuries and damages were proximately caused by the shooter, Buford Furrow.

I would affirm the dismissal of all claims on this statutory basis alone.

THE MAJORITY'S NEGLIGENCE THEORY WAS REJECTED BY THE CALIFORNIA SUPREME COURT IN MERRILL

The majority and appellants argue that appellees were negligent in that they breached a duty not to market their firearms products to criminals and others likely to misuse them. But California's highest court has specifically rejected this theory.

In *Merrill v. Navegar*, the California Supreme Court held that no cause of action could lie for a claim of "negligent marketing" of firearms. 26 Cal. 4th at 483, 110 Cal. Rptr. 2d 370, 28 P.3d 116. Like the incident

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[2] The majority and both parties seem to assume that section 1714.4 bars all products liability suits against gun manufacturers. But section 1714.4 does nothing of the sort. Rather, it states that certain types of analyses shall not be made in products liability actions. Section 1714.4 certainly would not bar a suit based on a manufacturing defect. For example, if a person were injured by a Colt .45 that was defective because it fired a bullet backward, rather than forward, that person could still sue the manufacturer of the gun for damages. Such an action would indisputably be a products liability action. Nothing in section 1714.4 would preclude it, for the plaintiff's injuries would be caused by the defective "discharge of a firearm," not by the gun's potential to cause injury. Cal. Civ. Code § 1714.4(b). The gun would not "be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged." *Id.* at § 1714.4(a). Instead, the gun would be defective because it "deviate[d] from the manufacturer's intended result." *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 424, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

underlying this case, the incident involved in *Merrill* was a violent tragedy of the kind which has become all too common in our nation's life. A crazed man bought an assault weapon and went on a shooting spree. Families of the victims sought to hold the manufacturers of the guns responsible under a negligence theory. In affirming the trial court's dismissal of the suit, the California Supreme Court held that section 1714.4 barred such a cause of action.

Like the majority here, the plaintiffs in *Merrill* argued that "section 1714.4 has no application to this case because it is not a product[s] liability action." *Id.* at 478, 110 Cal. Rptr. 2d 370, 28 P.3d 116. Like the majority, the *Merrill* plaintiffs argued that they sought to hold the gun manufacturer "liable for its negligent conduct, not for making a defective product." *Id.* But the California Supreme Court flatly rejected this argument, observing that negligent conduct could not be analyzed separately from product design:

> [V]irtually every person suing for injuries from firearm use could offer evidence the manufacturer knew or should have known the risk of making its firearm available to the public outweighed the benefits of that conduct, and could therefore raise a triable issue of fact for the jury. In each of these cases, the jury would be asked to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm. The result would be to resurrect the very type of lawsuit the Legislature passed section 1714.4 to foreclose . . .

Id. at 486, 110 Cal. Rptr. 2d 370, 28 P.3d 116.

The majority attempts to distinguish this case from *Merrill* with the allegation that appellees' marketing scheme "specifically target[ed] criminal users" as op-

posed to the general public. But it is a legally insignificant distinction that appellees allegedly marketed their guns to criminals intentionally, rather than just with the knowledge that criminals would obtain the guns. *See* Restatement (Second) of Torts § 8A, cmt. b (1965) ("Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."); *see also Vision Air Flight Serv. v. M/V Nat'l Pride*, 155 F.3d 1165, 1176 (9th Cir. 1998) (knowledge that cargo would be destroyed is legally the same as intentionally destroying cargo); *Schroeder v. Auto Driveaway Co.*, 11 Cal. 3d 908, 922, 114 Cal. Rptr. 622, 523 P.2d 662 (1974) (adopting Restatement rule).

Furthermore, like the "conduct" at issue in *Merrill*, this allegedly negligent conduct cannot be analyzed without weighing a particular firearm's risks in relation to its benefits. What kind of firearm was allegedly marketed to criminals is bound up with whether appellees' marketing choices were prudent. Marketing a hunting rifle knowing it will end up in the hands of criminals is different from marketing an assault weapon knowing it will end up in the hands of criminals. The majority's holding will require "a jury . . . to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm." *Merrill*, 26 Cal. 4th at 486, 110 Cal. Rptr. 2d 370, 28 P.3d 116.

In fact, the majority's opinion invites juries to engage in this type of cost/benefit analysis. The majority states that the "social value of manufacturing and distributing guns without taking basic steps to prevent these guns from reaching illegal purchasers and possessors cannot outweigh the public interest in keeping guns out of the

hands of illegal purchasers and possessors who in turn use them in crimes like the one that prompted plaintiffs' action here." Maj. Op. at 1205-1206. The majority then assures us that "[t]he debate over the social value of guns generally need not enter this case; rather, we must limit our evaluation to the social value of defendants' interest in distributing the guns" as the complaint alleges. *Id.* But section 1714.4 prohibits more than a generalized assessment of the social values of guns. It prohibits a cost/benefit analysis of specific firearms and ammunition as well. *See Merrill*, 26 Cal. 4th at 480-86, 110 Cal. Rptr. 2d 370. And to measure "the social value of defendants' interest" in distributing specific firearms in the manner alleged, it is necessary to evaluate the social value of these firearms.

The majority's negligence theory is essentially the same theory Justice Werdegar described in her dissent in *Merrill*:

> Plaintiffs' claim of negligence is, at bottom, that defendant Navegar . . . acted without due care in distributing the TEC 9/DC9-a semiautomatic handgun combining portability and ease of use with an extraordinary rapidity and capacity for lethal fire-power . . . Plaintiffs do not claim that the TEC 9/ DC9 is defective; nor do they even claim that defendant acted negligently *simply by making* the TEC 9/ DC9. Plaintiffs allege negligence, rather, in Navegar's *selling that firearm on the general civilian market knowing it would attract purchasers likely to misuse it*, rather than restricting sales to buyers with a lawful use for the tools of assaultive violence, such as police and military units. This theory of negligence [rests] on the allegation that particular marketing choices by Navegar were imprudent . . .

Id. at 493, 110 Cal. Rptr. 2d 370 (Werdegar, J., dissenting) (emphasis in the original). In defending this theory, however, Justice Werdegar stood alone.

Merrill also forecloses a theory that appellees are liable for "negligent advertising" or other efforts to reach out to people like Furrow. In *Merrill*, the California Supreme Court held that for a gun manufacturer to be liable for such conduct, a plaintiff would have to prove at least that the shooter asked for the guns used "by name." *Id.* at 491, 110 Cal. Rptr. 2d 370. Appellants have not alleged that Furrow asked for a Glock, or any other weapons he used, by name.[3]

Other California authority, too, supports dismissing this case. In *Jacoves v. United Merchandising Corp.*, the California Court of Appeal affirmed the trial court's judgment on the pleadings in favor of a firearms dealer in a negligence action attempting to hold the dealer liable for the suicide death of 20-year-old Jonathan Jacoves. 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468 (1992). Plaintiffs alleged that Jacoves walked into a Big-5 store and tried

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[3] If anything, the facts alleged here are less compelling than the facts alleged in *Merrill*. In *Merrill*, the plaintiffs alleged that the defendant gun manufacturer was negligent in that it marketed its guns to the general public while knowing that the guns would find their way to criminals. Here, appellants allege that the appellee gun manufacturers were negligent by marketing their guns to law enforcement while knowing that the guns will find their way to criminals. But appellants' allegation that the gun manufacturers purposefully "over-marketed" their product to law enforcement, which made the guns reach illegal markets faster, is not legally cognizable. The complaint alleges that "to win favor among police forces" appellees would "offer[ ] incentives, deals, upgrades, and encourag [e] police departments to try out new models." FAC ¶ 147. There is nothing tortious about this behavior. In general, a manufacturer of a legal product has no duty to refrain from attempting to sell as many products as possible.

to buy a handgun and ammunition. When he learned that he could not purchase the gun until the statutory waiting period had passed, he left the store. *Id.* at 118, 11 Cal. Rptr. 2d 468. Later, he returned to the store to buy a rifle for which there was no waiting period. "At the time of this purchase, [Jacoves] appeared youthful, confused, distraught, and trembling. He purchased a rifle and ammunition and was instructed in the use of the rifle. On that same day, he committed suicide with the Big-5 rifle." *Id.* The Court of Appeal held, as a matter of law, that such allegations were insufficient to establish that Big-5 owed Jacoves a duty of care. Id. The court found that Big-5 had no reason to anticipate that Jacoves "intended to commit suicide." *Id.*

The court in *Jacoves* held the plaintiffs to a much higher burden than this majority, which merely states that the "type of harm" alleged was foreseeable and that appellees therefore owed appellants a duty of care. *Jacoves* rejected this approach. Certainly the type of harm suffered in *Jacoves*—a gunshot wound—was foreseeable. Even so, the court focused on specific conduct by specific individuals, inquiring whether Big 5 employees knew of facts that would make Jacoves' suicide reasonably foreseeable. Here, there was no allegation that appellees knew that Buford Furrow would go on a shooting spree. Yet *Jacoves* requires just such an allegation to establish a duty of care.

For all these reasons, I would affirm the district court's dismissal of the negligence claim.

THE NUISANCE THEORY IS INCONSISTENT WITH CALIFORNIA LAW

The nuisance issue is simple. The majority ought to have disposed of it easily. I quote unequivocal language from the California Court of Appeal:

> Nuisance has been described as an "impenetrable jungle." . . . Civil Code section 3479 defines a nuisance as "[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . ."
>
> City cites no California decision, however, that allows recovery for a defective product under a nuisance cause of action. Indeed, under City's theory, nuisance "would become a monster that would devour in one gulp the entire law of tort. . . ."
>
> *[N]uisance cases "universally" concern the use or condition of property, not products.*

City of San Diego v. U.S. Gypsum Co., 30 Cal. App. 4th 575, 585-86, 35 Cal. Rptr. 2d 876 (1994) (emphasis added) (citations omitted).

Despite this clear language from a California appellate court, the majority states that "the district court's determination that a nuisance must be associated with property is contrary to clearly established California law." Amazingly, as authority for the clearly established law of *California*, the majority cites the *Ohio* Supreme Court and an *Illinois* appellate court. But it is the law of California that we are obliged to interpret today, not the law of Ohio or Illinois. *Cf. Erie*, 304 U.S. at 78, 58 S.Ct. 817. No California court has ever allowed a public nuisance claim to proceed against a manufacturer for lawful products which have been lawfully placed in the stream of commerce. *See City of San Diego*, 30 Cal. App. 4th at 586, 35 Cal. Rptr. 2d 876. It therefore comes as no surprise that the majority does not cite a single California

nuisance case in which the alleged nuisance did not relate to real property.[4]

While it devotes many pages to interpreting the Restatement and cases from foreign jurisdictions, the majority has no answer for the following twelve words: "nuisance cases 'universally' concern the use or condition of property, not products." *City of San Diego*, 30 Cal. App. 4th at 586, 35 Cal. Rptr. 2d 876.[5]

I would affirm the dismissal of the nuisance claim.

* * *

Basic principles of federalism require us to follow the will of the California Legislature, as construed by California's highest court, when interpreting the substantive law of California. We must be especially mindful of these principles when the subject matter is sensitive and controversial and when the state's legislature and high court have addressed it. As a federal court, we may not expand the authoritative pronouncements of a state's law in search of ways to reach what we view as a just result.

In passing section 1714.4, the California Legislature exempted gun manufacturers from liability for horrific

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[4] The majority maintains that the California Supreme Court "has never limited public nuisance suits in a manner that would prevent the claim alleged here." Perhaps this is true but I am aware of no principle of law dictating that a cause of action exists because the state's highest court has not rejected it.

[5] This statement was not a dictum. It was necessary to the court's decision rejecting a nuisance cause of action based upon defendant's products. In any event, a "federal court exercising diversity jurisdiction is bound to follow the considered dicta as well as the holdings of state court decisions." *Homedics v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1142 (9th Cir. 2003) (quoting *Rocky Mountain Fire & Casualty Co. v. Dairyland Ins. Co.*, 452 F.2d 603, 603-4 (9th Cir. 1971)).

incidents like the San Fernando Valley shootings of August 10, 1999. This may have been an unwise policy, but it is not a policy which we are at liberty to ignore. Like Justice Kennard in *Merrill*, I am troubled by the facts which give rise to this case. But I too am convinced that it "is not for us to question the wisdom of the Legislature's considered judgments." *Merrill*, 26 Cal. 4th at 492, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (Kennard, J., concurring).

The debate over the extent to which gun manufacturers should be held liable to victims of gun violence belongs in the democratic process. The public debate benefits from able advocates on all sides—we need not enter it.

I would affirm the district court's dismissal of all claims.

APPENDIX D
IN THE UNITED STATES COURT OF APPEALS FOR THE NINTHCIRCUIT

No. 02-56197

LILIAN S. ILETO, AN INDIVIDUAL AND MOTHER TO JOSEPH S. ILETO, DECEASED; JOSHUA STEPAKOFF, A MINOR, BY HIS PARENTS LOREN LIEB AND ALAN B. STEPAKOFF; MINDY GALE FINKELSTEIN, A MINOR, BY HER PARENTS DAVID AND DONNA FINKELSTEIN; BENJAMIN KADISH, A MINOR BY HIS PARENTS ELEANOR AND CHARLES KADISH; NATHAN LAWRENCE POWERS, A MINOR BY HIS PARENTS GAIL AND JOHN MICHAEL POWERS, FOR HIMSELF AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

V.

GLOCK INC., A GEORGIA CORPORATION; CHINA NORTH INDUSTRIES CORP., A CHINESE ENTITY AKA NORINCO; DAVIS INDUSTRIES, A CALIFORNIA CORPORATION; REPUBLIC ARMS INC., A CALIFORNIA CORPORATION; JIMMY L. DAVIS, AN INDIVIDUAL; BUSHMASTER FIREARMS, A MAINE CORPORATION; RSR MANAGEMENT CORPORATION; RSR WHOLESALE GUNS SEATTLE INC.,

Defendants-Appellees,

AND

MAADI, AN EGYPTIAN BUSINESS ENTITY; IMBEL, A BRAZILIAN BUSINESS ENTITY; THE LOANER PAWNSHOP TOO, A WASHINGTON CORPORATION; DAVID MCGEE, AN INDIVIDUAL; GLOCK GMBH, AN AUSTRIAN BUSINESS ENTITY,

Defendant.

FILED MAY 28, 2004

Before: HALL, THOMAS, and PAEZ, Circuit Judges.

ORDER

The panel majority has voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge Hall voted to grant the petition for panel rehearing, and recommended granting the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R.App. P. 35.

The petition for rehearing en banc is denied.

CALLAHAN, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, KLEINFELD, GOULD, TALLMAN, BYBEE, and BEA join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the court's decision not to hear this case en banc. The opinion of the majority of the panel improperly and inaccurately interprets California's negligence and public nuisance law to expand wrongly the exposure of manufacturers. Furthermore, if California's negligence and public nuisance law were so unsettled as to allow for the majority's creative interpretation of California law, we should have certified the issues to the California Supreme Court.

A

This is indeed a tragic case. On August 10, 1999, Buford Furrow, a mentally troubled man who was prohibited by federal law from purchasing a gun, approached the North Valley Jewish Community Center (JCC) in Granada Hills, California. He was armed with a number of firearms. He entered the JCC and proceeded to shoot and injure three young children, one teenager, and one adult. Furrow fled the JCC and, later that day, shot and killed Joseph Ileto, a United States Postal worker.

This action, as it comes before this court, is not against Furrow or even against the entities that sold the weapons to Furrow, but against the entities that manufactured the weapons outside of California and sold them outside of California.

The plaintiffs allege that the defendant gun manufacturers and distributors produce, distribute, and sell more firearms than legal purchasers can buy, and that they knowingly facilitate, and benefit from, a secondary market where persons who are illegal purchasers and have injurious intent obtain their firearms. Plaintiffs do not allege that Glock[1] did anything illegal. Rather, they argue that Glock knew that the secondary market "regularly provides guns to criminals and underage end users," but nonetheless failed to "exercise reasonable care to protect the public from the risks created by the distribution and marketing schemes that create an illegal secondary market."

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[1] Glock is the manufacturer of one of the guns that Furrow used to injure his victims. Glock is sometimes used as a shorthand reference to all the remaining defendants.

Plaintiffs also assert a broad nuisance claim. According to the plaintiffs, Glock's marketing and distribution policies "knowingly created and maintained an unreasonable interference with rights common to the general public, constituting a public nuisance under California law." Plaintiffs allege that "this interference is not insubstantial or fleeting, but rather involves a disruption of public peace and order in that it adversely affects the fabric and viability of the entire community."

The critical feature of these claims is their breadth. Again, Glock is not alleged to have done anything illegal. Rather, its liability is based on a theory that it failed to reduce profits because it allegedly knew (or a factfinder might find that it should have known) that its heightened output (all of which is legally sold) created a surplus in a secondary market, which Glock allegedly knew was utilized by "criminals and underage end users." How many other manufacturers or distributors of products that find their way into California will be burdened with similar allegations?

In the field of products liability, courts have extended concepts such as duty and causation to encompass end users and victims of defective products. Plaintiffs, however, do not allege that the underlying firearms were defective. Nevertheless, the panel in countenancing plaintiffs' theories takes product liability concepts of duty and causation and applies them to common negligence and public nuisance laws.

The potential impact of the panel's decision is staggering: Any manufacturer of an arguably dangerous product that finds its way into California can be hauled into court in California to defend against a civil action brought by a victim of the criminal use of that product. The manufacturer's liability will turn not on whether the

product was defective, but whether its legal marketing and distribution system somehow promoted the use of its product by "criminals and underage end users." Thus, General Motors could be sued by someone who was hit by a Corvette that had been stolen by a juvenile. The plaintiff would allege that General Motors knew that cars that can greatly exceed the legal speed limit are dangerous, and through advertising and by offering discounts, it increased the attractiveness of the car and the number of Corvettes on the road and thus increased the likelihood that a juvenile would steal a Corvette and operate it in a injurious manner.

B

This is not California law. The majority of the panel admits as much when it writes, "[b]ecause we are sitting in diversity, and there are no supreme court or appellate court decisions in California that have addressed the specific claims alleged by the plaintiffs, we must attempt to determine how the California Supreme Court might decide the issue." *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). I disagree. We should not have attempted "to determine how the California Supreme Court might decide the issue," but should have certified the issue to the California Supreme Court to allow it to decide the issue in the first instance (see section G). Furthermore, if we must predict what California law is, Judge Hall's dissent accurately reflects the considerations and precedents bearing on the issues and explains why the California Supreme Court would not rule in the manner theorized by the panel.

C

The impropriety of the majority's attempt to import product liability concepts into common negligence law may be seen in its treatment of the California Supreme

Court's decision in *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (2001). That case arose out of another tragic incident in which a man armed with rapid-firing handguns entered a law office in San Francisco and killed eight persons and wounded six before killing himself. *Id.* at 472, 110 Cal. Rptr. 2d 370, 28 P.3d 116.

Plaintiffs, survivors and representatives of some of the victims, sued the manufacturer of the handguns on a common law negligence theory. *Id.* at 470, 473, 110 Cal. Rptr. 2d 370, 28 P.3d 116. Plaintiffs sought to hold Navegar liable for its decision to make guns available for sale to the general public that it "knew or should have known have 'no legitimate sporting or self-defense purpose' and which are 'particularly well-adapted to a military-style assault on large numbers of people.'" *Id.* at 474, 110 Cal. Rptr. 2d 370, 28 P.3d 116. The California Supreme Court, in a 6 to 1 decision, affirmed the trial court's grant of summary judgment for Navegar on the ground that plaintiffs' common law negligence claim was barred by California Civil Code § 1714.4. *Id.* at 491-92, 110 Cal. Rptr. 2d 370, 28 P.3d 116.

The majority here distinguishes *Merrill* by concluding that plaintiffs' claims are not barred by Cal. Civ. Code § 1714.4[2] and noting the differences between the claims in *Merrill* and this case. *Ileto*, 349 F.3d at 1200-02. The

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[2] Again, Judge Hall's dissent has the better perspective that this action is a products liability action barred by Cal. Civ. Code § 1714.4. Ileto, 349 F.3d at 1218-20. However, the scope of the panel's opinion is enhanced by the fact that Cal. Civ. Code § 1714.4 has been repealed. Nonetheless, this does not mean that California law is as the panel opines. The repeal of Cal. Civ. Code § 1714.4 was intended to preserve causes of action as they would have existed had § 1714.4 not been enacted in 1983.

majority's differentiation of the claims in *Merrill* reflects a lack of appreciation of California law.

The majority distinguishes *Merrill* on the grounds that, there, the guns were alleged to be defective, whereas here, the plaintiffs acknowledge that the products were not defective. *Id.* at 1201. This allows the majority to opine that "this case is not a products liability case reframed as a negligence case, but rather it is a classic negligence and nuisance case." *Id.* at 1202. This is not a classic negligence case.

The first element of a negligence claim is duty. Glock sold the gun to a police department in Washington, and allegedly facilitated the gun's subsequent sale to a former police officer, Dineen, who had a gun store. Dineen sold the gun to a gun collector, who allegedly did not have a firearms license. He sold it to another unlicensed gun collector, who allegedly sold it to Furrow in Washington State. The concept that the manufacturer may be liable to the ultimate user or victim is accepted in product liability law, but according to the majority, plaintiffs' claim is not based on product liability. Why then should Glock be held liable for the criminal action of an end-user of a product that is not defective?

The majority answers this question by conflating duty, which is a question of law, with foreseeability. The majority reasons:

> The allegations here that the defendants created an illegal secondary firearms market that was intentionally directed at supplying guns to prohibited gun purchasers like Furrow are more than sufficient to raise a factual question as to whether the defendants owed the plaintiffs a duty of care and whether the defendants breached that duty. As the California Supreme Court has stated, a defendant's

> duty of care extends to those individuals a defendant puts at an unreasonable risk of harm through the reasonably foreseeable actions of a third party. Here, plaintiffs have alleged sufficient facts for a reasonable jury to conclude that through their distribution practices, defendants have created an illegal secondary market targeting prohibited purchasers that placed plaintiffs in a situation in which they were exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of a prohibited purchaser like Furrow.

Id. at 1204 (internal citation omitted). This is a fancy way of saying that, because plaintiffs allege that it was foreseeable that someone like Furrow would obtain and misuse a gun, ergo Glock has a duty to anyone who is harmed by Furrow's misuse of the gun.

This is not the law in California. Under California law, the concept of duty in an action alleging common law negligence is a multi-pronged inquiry, and is not limited to determining the foreseeability of harm to the plaintiffs. *See Rowland v. Christian*, 69 Cal. 2d 108, 112-13, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). Moreover, under negligence law, a defendant has no duty to control the conduct of a third party, absent a special relationship between the defendant and the third party. *Jacoves v. United Merch. Corp.*, 9 Cal. App. 4th 88, 114, 11 Cal. Rptr. 2d 468 (1992); *Martinez v. Pac. Bell*, 225 Cal. App. 3d 1557, 1567, 275 Cal. Rptr. 878 (1990).

The majority not only incorrectly determined that the harm to Furrow's victims was foreseeable, it also failed to address any of the remaining factors in the duty inquiry. Specifically, the panel failed to analyze: (1) the closeness of connection between the conduct of the defendant and the injury; (2) the moral blame attached to the defen-

dant's conduct; (3) the policy of preventing future harm; (4) the extent of the burden to the defendant; (5) the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (6) the availability, cost, and prevalence of insurance for the risk involved. *See Merrill*, 26 Cal. 4th at 477, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (quoting *Rowland*, 69 Cal. 2d at 113, 70 Cal. Rptr. 97, 443 P.2d 561).[3] As applied to plaintiffs' allegations, none of these elements support the legal conclusion that Glock owed a duty to the victims of Furrow's criminal actions.

D

The majority also improperly uses product liability concepts of causation to determine that Glock's alleged encouragement of the secondary market was the cause of the underlying injuries. First, relying principally on cases from other states, the majority concludes that it cannot disprove a negative: it cannot find that Glock owed no duty to plaintiffs. Second, relying on a medical malpractice case, *Landeros v. Flood*, 17 Cal. 3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976), the majority surmises that "it was reasonably foreseeable that if Glock con-

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[3] Unlike negligence, strict liability law has evolved past these barriers to liability. Early on, California decided to impose strict products liability on manufacturers and others in the chain of commerce, regardless of their proximity to the injured plaintiff, of moral blame, and of the other traditional negligence considerations mentioned above. The courts reasoned that the costs of compensation could more equitably be borne by the commercial classes than the injured plaintiffs. *See, e.g., Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-63, 37 Cal. Rptr. 896, 391 P.2d 168 (1964) (holding that a manufacturer's and a retailer's liability should be imposed irrespective of fault); *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 63-64, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) (holding a manufacturer's liability should be imposed irrespective of fault).

tinued to foster the illegal secondary market, a person like Furrow who was prohibited by law from purchasing a gun would be able to purchase one and use the gun in the manner that was the basis for prohibiting such purchases in the first place." *Ileto*, 349 F.3d at 1209.

This approach is contrary to the law that defendants do not have a duty to control the activities of third parties, absent a special relationship. In *Martinez*, a California court noted: "Whether liability is based upon nuisance or negligence, the scope of that liability has been similarly measured: It extends to damage which is proximately or legally caused by the defendant's conduct, not to damage suffered as a proximate result of the independent intervening acts of others." 225 Cal. App. 3d at 1565, 275 Cal. Rptr. 878.

As noted by Judge Hall in her dissent, this is the clear import of *Jacoves*. *Ileto*, 349 F.3d at 1222-23. There, the California court held that the plaintiffs did not have a cause of action against the store that sold a "confused, distraught, and trembling" young man a rifle, which he then used to commit suicide, because, as a matter of law, the store had no duty to refuse to sell the rifle to the young man. *Jacoves*, 9 Cal. App. 4th at 118, 11 Cal. Rptr. 2d 468. The court explained: "In order to impose a duty on Big 5 to refuse to sell the rifle and ammunition to Jonathan, the complaint must allege that Big 5 knew, or had reason to know, that Jonathan was reasonably likely to use the rifle to harm himself." *Id.* If a store that sells a rifle to a "confused, distraught, and trembling" young man does not legally foresee his use of the rifle on himself, how, under California law, may Glock be said to have legally foreseen that a person it did not know would buy a gun in Washington State, from a seller Glock did not know, and proceed to shoot at children in Los Angeles

and kill a postal worker? Unlike the fact situation in *Landeros*—a case concerning a doctor's alleged failure to diagnose and treat battered child syndrome—Glock did not know, and could not have known of Furrow, or of any of his victims.[4]

E

The panel majority's holding that plaintiffs have a cause of action under a nuisance theory is also contrary to California law, as noted by Judge Hall in her dissent. *Ileto*, 349 F.3d at 1223-24. Nuisance cases have uniformly required some property to be protected against the nuisance. *See City of San Diego v. U.S. Gypsum Co.*, 30 Cal. App. 4th 575, 585, 35 Cal. Rptr. 2d 876 (1994). Under the majority's creative theory, "nuisance' would become a

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[4] Although not decided at the time the panel issued its decision, the California Supreme Court's opinion in *Wiener v. South-coast Childcare Centers, Inc.*, 32 Cal. 4th 1138, 12 Cal. Rptr. 3d 615, 88 P.3d 517 (2004), indicates that under California law Glock could not be held to have foreseen Furrow's criminal actions.

In Wiener, Abrams deliberately drove his car through a four-foot-high chain-link fence that enclosed a child care facility's playground, killing two children and injuring several others. The parents of the deceased children sued the child care center alleging that the accident was foreseeable and that the chain-link fence provided inadequate protection. The California Supreme Court affirmed a grant of summary judgment for defendants. It reiterated that determining whether a duty exists involves the balancing of a number of considerations, citing *Rowland*. 32 Cal. 4th at 1144-45, 12 Cal. Rptr. 3d 615, 88 P.3d 517. The court went on to state that its cases "analyze third party criminal acts differently from ordinary negligence, and require us to apply a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties." 32 Cal. 4th at 1149-50, 12 Cal. Rptr. 3d 615, 88 P.3d 517. This is because, (1) "it is difficult if not impossible in today's society to predict when a criminal might strike:" and (2) "if a criminal decides on a particular goal or victim, it is extremely difficult to remove his every means for achieving that goal." *Id.*

monster that would devour in one gulp the entire law of tort.'" *Id.* at 586, 35 Cal. Rptr. 2d 876 (quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum*, 984 F.2d 915, 921 (8th Cir. 1993)).

F

The disruptive impact of the majority's decision is not minimized by the fact that this appeal is from the grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), nor is it mitigated by the fact that the majority's interpretation of California law is not binding on California courts.

If the majority's theory holds, gun manufacturers may have massive and industry-transforming potential liability for all gun-related violent crime in California. Furthermore, by converting duty and causation into a foreseeability test, the majority has created a standard that, as a practical matter, is immune from motions to dismiss under Fed. R. Civ. P. 12(b)(6) or motions for summary judgment. The very fact that a tragedy occurred—that someone was killed or injured by the defendant's product—makes its "foreseeability" a question for the fact-finder, the jury.

The practical costs of forcing manufacturers to defend to juries all non-meritorious claims, as well as arguably meritorious claims, for all injuries that occurred in California cannot help but have a substantial impact on California's economy.

The irony of the majority's decision is that its creative interpretation of California law also burdens the federal district courts. California state courts are free to disregard the panel's decision, but federal district courts in California are not. Competent plaintiffs' lawyers will surely file their actions in federal district courts, citing diversity for jurisdiction and demanding that the district courts follow the Ninth Circuit's interpretation of Cali-

fornia law. As these cases will be filed in federal courts, they will not provide the California Supreme Court any opportunity to correct the majority's interpretation of California law.

G

The final irony is that the panel's decision, its impact on California and manufacturers, and its infringement on principles of federalism, were avoidable. Pursuant to Rule 29.8(a) of the California Rules of Court, we could have, and should have, certified the issues of California law to the California Supreme Court.[5]

We last certified questions to the California Supreme Court in *Kremen v. Cohen*, 325 F.3d 1035, 1037-38 (9th Cir. 2003). In that case, we certified questions related to Internet domain names and the tort of conversion. *Id.* We recognized that this procedure is "reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts." *Id.* at 1037. We noted that certification would not be appropriate to avoid a difficult legal issue or to sidestep our diversity jurisdiction. *Id.* at 1038. We indicated that we were aware of the "burgeoning caseload of the California Supreme Court" and "would not presume to certify a

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[5] The en banc call in this case sought certification of the issues of California law to the California Supreme Court. There is precedent for certifying a question to a state supreme court after a three-judge panel has rendered an opinion. In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 294 F.3d 1085, 1086 (9th Cir. 2002), a three-judge panel heard argument and rendered a decision. Rehearing and rehearing en banc were sought. *Id.* The panel then withdrew its opinion, granted the petition for rehearing, and certified a question to the Washington Supreme Court, even though the parties at oral argument had unanimously requested that the court not certify the state law question to the Washington Supreme Court. *Id.*

run-of-the-mill case." *Id.* Rather, in a case "that raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause[d] us to seek certification." *Id.* Judge Kozinski, dissenting from the certification, urged that "[c]ertification is justified only when the state supreme court has provided no authoritative guidance, other courts are in serious disarray and the question cries out for a definitive ruling." *Id.* at 1044.

This case meets all these criteria. To the extent that *Merrill* is distinguishable, as the majority contends, the California Supreme Court has not provided authoritative guidance. The panel's opinion is likely to create disarray in federal and state courts in California. Furthermore, reflection on the potential consequences of the panel's position cries out for an initial determination by the California Supreme Court. Manufacturers are often the "deep pockets" when innocent people are killed or injured by the misuse or criminal use of dangerous products. The panel would allow manufacturers to be sued even though their products are not alleged to be defective and even though the actual perpetrator of the injury acted criminally, simply because the manufacturer allegedly sought to market more goods than the plaintiffs believe the market could safely handle.

Certification of this case is supported by our decision in *Torres v. Goodyear Tire & Rubber Co. Inc.*, 867 F.2d 1234, 1239 (9th Cir. 1989), certifying to the Arizona Supreme Court the question whether a trademark licensor is strictly liable for personal injuries caused by a defective product bearing its trademark. In *Torres*, we noted that "some courts have concluded that strict liability should attach to the trademark licensor as one within the 'stream of commerce' in which the product flows." *Id.* at

1238. We listed seven cases, as well as commentators, supporting this proposition and listed no cases to the contrary. *Id.* Nonetheless, the court stated, "we hesitate prematurely to extend the law of products liability in the absence of an indication from the Arizona courts or the Arizona legislature that such an extension would be desirable." *Id.*

The discussion of strict liability in *Torres* also recommends certification in this case. We noted that the Restatement (Second) of Torts § 402A imposes strict liability on "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property." *Id.* at 1237 (editing in original). We further commented that under Arizona law, "[s]trict liability is a public policy device to spread the risk from one to whom a defective product may be a catastrophe, to those who marketed the product, profit from its sale, and have the know-how to remove its defects before placing it in the chain of distribution." *Id.* (citations and quotation marks omitted).

The majority of the panel in this case, contrary to *Torres*, rushes to extend the equivalent of strict liability to the manufacturer of a product that the plaintiffs admit was not defective. Accordingly, there is no way that the manufacturer could remove the "defects" before placing the item into the chain of distribution. The majority, undaunted, seeks to impose liability on a manufacturer because the manufacturer's otherwise legal marketing of a non-defective product allegedly encourages an "illegal gun market." Such a determination of a state's "public policy" should be made by the state's supreme court or its legislature, rather than imposed on a state by a federal court exercising diversity jurisdiction.

Finally, in declining to certify this case to the California Supreme Court, the court fails to heed the advice of the United States Supreme Court. In *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-80, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997), the Supreme Court vacated our decision and chastised us for not using the certification process.

> Blending abstention with certification, the Ninth Circuit found "no unique circumstances in this case militating in favor of certification." Novel, unsettled questions of state law, however, not "unique circumstances," are necessary before federal courts may avail themselves of state certification procedures. Those procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions. Taking advantage of certification made available by a State may "greatly simplify" an ultimate adjudication in federal court.

520 U.S. at 79, 117 S. Ct. 1055 (citations, footnote and editing omitted).

H

In sum, I dissent on two separate but related grounds from our decision not to take this case en banc. First, fundamental concepts of federalism, emphasized in *Torres* and *Arizonans for Official English*, required that we certify the questions of California law to the California Supreme Court. We should not reach out to create a state's "public policy" unless there is no alternative.

Second, the majority of the panel's creative interpretation of California law is wrong and will have a deleterious impact on California, manufacturers, and the federal and state courts in California. Common negligence concepts of duty and causation do not allow the unfortunate victims of the criminal use of a dangerous,

but not defective, product to recover from the product's manufacturer simply because the manufacturer's marketing schemes allegedly promoted a secondary market that purportedly facilitated the illegal purchase of the product. California law does not support this imposition of the equivalent of strict liability.

KOZINSKI, Circuit Judge, with whom Judges O'SCANNLAIN, KLEINFELD, GOULD, CALLAHAN and BEA, join:

Imposing novel tort theories on economic activity significantly affects the risks of engaging in that activity, and thus alters the cost and availability of the activity within the forum jurisdiction. In effect, it is a form of regulation administered through the courts rather than the state's regulatory agencies. It is, moreover, a peculiarly blunt and capricious method of regulation, depending as it does on the vicissitudes of the legal system, which make results highly unpredictable in probability and magnitude. Courts should therefore be chary of adopting broad new theories of liability, lest they undermine the democratic process through which the people normally decide whether, and to what degree, activities should be fostered or discouraged within the state. This caution applies with particular force to federal courts, whose judges are not appointed through the state's political processes, and may not even live within the states affected by their decisions. For these reasons, and those aptly stated by Judge Callahan, I respectfully dissent from our court's failure to take this case en banc.

APPENDIX E
IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 06-56872, 07-15403, 07-15404

LILIAN S. ILETO, AN INDIVIDUAL AND MOTHER TO JOSEPH S. ILETO, DECEASED; JOSHUA STEPAKOFF, A MINOR, BY HIS PARENTS LOREN LIEB AND ALAN B. STEPAKOFF; MINDY GALE FINKELSTEIN, A MINOR, BY HER PARENTS DAVID AND DONNA FINKELSTEIN; BENJAMIN KADISH, A MINOR, BY HIS PARENTS ELEANOR AND CHARLES KADISH; AND NATHAN LAWRENCE POWERS, A MINOR, BY HIS PARENTS GAIL AND JOHN MICHAEL POWERS, FOR HIMSELF AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

GLOCK, INC., A GEORGIA CORPORATION; RSR MANAGEMENT CORPORATION; AND RSR WHOLESALE GUNS SEATTLE INC.,

Defendants-Appellees,

MAADI, AN EGYPTIAN BUSINESS ENTITY; QUALITY PARTS CO., FORMERLY DOING BUSINESS AS BUSHMASTER FIREARMS, A MAINE CORPORATION; IMBEL, A BRAZILIAN BUSINESS ENTITY; THE LOANDER PAWNSHOP TOO, A WASHINGTON CORPORATION; DAVID MCGEE, AN INDIVIDUAL; INTRAC ARMS INTERNATIONAL, INC., A TENNESSEE CORPORATION, FORMERLY DOING BUSINESS AS INTRAC CORPORATION ALSO KNOWN AS DOE 1, AND CHINA NORTH INDUSTRIES CORP., AKA NORINCO,

Defendants,

AND

UNITED STATES OF AMERICA,

Defendant-Intervenor- Appellee.

LILIAN S. ILETO, AN INDIVIDUAL AND MOTHER TO JOSEPH S. ILETO, DECEASED; JOSHUA STEPAKOFF, A MINOR, BY HIS PARENTS LOREN LIEB AND ALAN B. STEPAKOFF; MINDY GALE FINKELSTEIN, A MINOR, BY HER PARENTS DAVID AND DONNA FINKELSTEIN; BENJAMIN KADISH, A MINOR, BY HIS PARENTS ELEANOR AND CHARLES KADISH; AND NATHAN LAWRENCE POWERS, A MINOR, BY HIS PARENTS GAIL AND JOHN MICHAEL POWERS, FOR HIMSELF AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

V.

CHINA NORTH INDUSTRIES CORP., AKA NORINCO,

Defendant-Appellee,

AND

UNITED STATES OF AMERICA,

Defendant-Intervenor- Appellee.

AND

RSR MANAGEMENT CORPORATION; RSR GROUP NEVADA, INC., FORMERLY DOING BUSINESS AS RSR WHOLESALE GUNS SEATTLE INC.; MAADI, AN EGYPTIAN BUSINESS ENTITY; QUALITY PARTS CO., FORMERLY DOING BUSINESS AS BUSHMASTER FIREARMS, A MAINE CORPORATION; IMBEL, A BRAZILIAN BUSINESS ENTITY; THE LOANDER PAWNSHOP TOO, A WASHINGTON CORPORATION; DAVID MCGEE, AN INDIVIDUAL; INTRAC ARMS INTERNATIONAL, INC., A TENNESSEE CORPORATION, FORMERLY DOING BUSINESS AS INTRAC

CORPORATION ALSO KNOWN AS DOE 1; GLOCK, INC., A GEORGIA CORPORATION,

Defendants.

LILIAN S. ILETO, AN INDIVIDUAL AND MOTHER TO JOSEPH S. ILETO, DECEASED; JOSHUA STEPAKOFF, A MINOR, BY HIS PARENTS LOREN LIEB AND ALAN B. STEPAKOFF; MINDY GALE FINKELSTEIN, A MINOR, BY HER PARENTS DAVID AND DONNA FINKELSTEIN; BENJAMIN KADISH, A MINOR, BY HIS PARENTS ELEANOR AND CHARLES KADISH; AND NATHAN LAWRENCE POWERS, A MINOR, BY HIS PARENTS GAIL AND JOHN MICHAEL POWERS, FOR HIMSELF AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellees,

V.

CHINA NORTH INDUSTRIES CORP., AKA NORINCO,

Defendant-Appellant,

AND

RSR MANAGEMENT CORPORATION; RSR GROUP NEVADA, INC., FORMERLY DOING BUSINESS AS RSR WHOLESALE GUNS SEATTLE INC.; MAADI, AN EGYPTIAN BUSINESS ENTITY; QUALITY PARTS CO., FORMERLY DOING BUSINESS AS BUSHMASTER FIREARMS, A MAINE CORPORATION; IMBEL, A BRAZILIAN BUSINESS ENTITY; THE LOANDER PAWNSHOP TOO, A WASHINGTON CORPORATION; DAVID MCGEE, AN INDIVIDUAL; INTRAC ARMS INTERNATIONAL, INC., A TENNESSEE CORPORATION, FORMERLY DOING BUSINESS AS INTRAC CORPORATION ALSO KNOWN AS DOE 1; GLOCK, INC., A GEORGIA CORPORATION,

Defendants.

Appeal from the United States District Court
for the Central District of California

Argued and Submitted Aug. 5, 2008
Filed May 11, 2009

Before: REINHARDT, GRABER, and BERZON, Circuit Judges.

Judges Reinhardt and Graber have voted to deny the petition for rehearing en banc, and Judge Berzon has voted to grant it.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing en banc is DENIED.

APPENDIX F

RELEVANT STATUTORY PROVISIONS

The U.S. Constitution, Art. III, Section 1, provides in relevant part as follows:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The U.S. Constitution, Amendment V, provides in relevant part as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903, provides in relevant part as follows:

Title 15. Commerce and Trade

Chapter 105—Protection of Lawful Commerce in Arms

§ 7901. Findings; purposes

(a) Findings

Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or

transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to

use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

§ 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

§ 7903. Definitions

In this chapter:

(1) **Engaged in the business**

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of Title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

The California Civil Code, provides in relevant part as follows:

* * * * *

§1714(a).

Everyone is responsible, not only for the results of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section. The extent of liability in these cases is defined by the Title on Compensatory Relief.

* * * * *

§3479. Acts Constituting Nuisance.

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

* * * * *

§3480. Public Nuisance.

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the

annoyance or damage inflicted upon individuals may be unequal.